Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LESLIE RAY COX, *et al.*,
Petitioners (plaintiffs below),

v.

USX CORPORATION, *et al.*,
Respondents (defendants below).

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an employer has bribed union officials to enter into a concessionary local bargaining agreement, which modified a national collective bargaining agreement, did the Court of Appeals deprive the plaintiff employees of the benefit of the national collective bargaining agreement when the court held that the local agreement was voidable but stated that this does not mean that plaintiff employees are entitled to be compensated pursuant to the national agreement, and stated that plaintiffs are entitled to recover only the "fair market value" of services plaintiffs rendered?

2. Are those employees not recalled to work because the voidable local agreement abolished some jobs and permitted other jobs formerly held by union members to be "contracted out" entitled to recover damages pursuant to the national collective bargaining agreement?

3. Did the Court of Appeals err in failing to recognize that plaintiffs are entitled to recover the money that the employer realized by bribing union officials into entering a concessionary local collective bargaining agreement?

4. Where an employer has bribed union officials to enter into a concessionary local collective bargaining agreement, did the Court of Appeals err in placing on the plaintiff employees the burden of proving what the terms of the local agreement would have been had there been no bribery?

5. Where an employer bribes union officials and the union conspires with the employer and the officials to conceal the bribes, are plaintiff employees entitled to recover the dues they paid the union in the expectation of receiving honest and fair representation?

6. Did the Court of Appeals err in accepting as true the assertions of defendant employer (a convicted felon), defendant

union and the bribed union officials (convicted felons) that the employer had been unwilling to recall plaintiff employees to work pursuant to the terms of a recently negotiated national collective bargaining agreement?

7. Should an international union, an unincorporated association of its members which has a duty of undivided loyalty to its members, be permitted to assert the attorney-client privilege against its members and thereby conceal from its members at a local plant actions and decisions by the union which relate to bribery of union representatives and breaches of the union's fiduciary duties to all members at the local plant?

8. Is it sufficient to establish a *prima facie* case for applicability of the crime-fraud exception to the attorney-client privilege to show that the employer and the bribed Union representatives have been convicted, the union concealed, conspired and participated in the illegal and fraudulent acts and the attorney-client communications relate to the union's knowledge of and involvement in the concealment of the bribes?

9. Did the Eleventh Circuit err in affirming the district court's denial of plaintiffs' motion to compel defendants to produce transcripts of grand jury testimony that was in each defendant's possession?

PARTIES

In addition to the parties listed in the caption, additional petitioners (plaintiffs in the courts below) were R.M. Cox, Larry Driver, Barry Nichols, John Bullard, Robert W. Kennedy, Jr., Lorenzo C. East, Clarence M. Pope, Jr., C.R. Altes, Jack E. Merrymon, Terry P. West, R.S. Arnold, M.W. Milstead, J.W. Wade, Manning A.C. Snider, Terry H. Melvin, Thomas E. Hill, Gary D. Swann, Ronald E. Frazier, Anthony J. Crapet, Robert M. Green, Heath L. McMeans, III, Billy Carter, Joe A. Knight, Phillip L. Drummond, Brack Wells, George Boglin, Dennis E. Jones, Dennis R. Fulton, Don L. Flurry, W.T. Mayberry, Willie Young, Robert Poole, Wardell Clark, William J. Nation, Oscar Lee Perry, Harold S. Turner, and James R. Miller. Petitioners were certified below as representatives of a plaintiff class consisting of all current and former employees of USX's Jefferson County, Alabama facilities who were at any time represented by the United Steelworkers of America since July 1, 1983. An additional defendant was the United States Steel and Carnegie Pension Fund.

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Plaintiffs Leslie Ray Cox, et al., respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 17 F.3d 1386 (11th Cir. 1994), and appears as Appendix A ("App. A," pp. 1a-70a). The order of the Eleventh Circuit modifying the panel decision and denying rehearing is reported at 30 F.3d 1347 (11th Cir. 1994) and appears as Appendix G ("App. G," pp. 179a-182a). The opinion of the United States Court of Appeals for the Eleventh Circuit affirming criminal convictions in a related proceeding, *United States v. Phillips,* is reported at 19 F.3d 1565 (11th Cir. 1994).

The order of the Eleventh Circuit denying petitions for rehearing *en banc* in the related appeal from the criminal convictions is reported without opinion at 33 F.3d 1384 (11th Cir. 1994). The pertinent opinions, orders and final judgment of the United States District Court for the Northern District of Alabama are unreported but are included in Appendix B ("App. B," pp. 71a-149a), Appendix C ("App. C," pp. 150a-156a), Appendix D ("App. D," p. 157a), Appendix E ("App. E," pp. 158a-160a), and Appendix F ("App. F," pp. 161a-178a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 5, 1994. On August 19, 1994, the Court of Appeals denied a timely petition for rehearing. This petition is timely under 28 U.S.C. § 2101(c) and Rule 13.4 of the Rules of the United States Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of federal law are involved:

29 U.S.C. § 186: Appendix H, ("App. H," pp. 183a-188a).

18 U.S.C. § 1961(1)(C): Appendix H, ("App. H," p. 188a).

29 U.S.C. § 185(a): Appendix H, ("App. H," p. 188a).

18 U.S.C. § 1964(c): Appendix H, ("App. H," p. 188a).

18 U.S.C. § 1963(a)(3): Appendix H, ("App. H," p. 189).

STATEMENT OF THE CASE

A. Statement of Facts.

On March 31, 1981, the Board of Directors of USX Corporation (hereafter "USX" or the "Company") appropriated over $800 million for construction of a seamless pipe mill at its Fairfield Works complex in Fairfield, Alabama. The appropria-

tion request stated that USX intended to supply the Pipe Mill, when completed, with molten steel from Fairfield Works (which had been recently modernized at a cost of $1.3 billion). After construction of the Pipe Mill began in 1981, the workers at Fairfield Works were laid off. Fairfield Works was not permanently closed.[1] When the Pipe Mill was completed in December 1983 and began operations, USX reopened Fairfield Works and recalled about 1300 workers.

In March 1983, USX and defendant United Steelworkers of America (hereafter "Union") negotiated a new national collective bargaining agreement known as the 1983 Basic Labor Agreement (hereafter "BLA") that contained many concessions by the Union.[2] The 1983 BLA covered all non-exempt production and maintenance employees at all USX facilities in the United States and Canada.

In September 1983, USX and the Union began negotiations with respect to a local agreement which affected over 5,000 employees in Jefferson County, Alabama. Thermon Phillips and E.B. Rich, officers and full-time employees of the Union, represented rank-and-file steelworkers in these negotiations. At the commencement of the negotiations and in violation of 29 U.S.C. § 186, Rich gave William Miller, USX's principal negotiator, a list of nine Union officials and told Miller that there would be no local agreement unless USX agreed to pay specified Union officials pensions from the United States Steel & Carnegie Pension Fund. The Union officials were not qualified to receive Company pensions. The pension demand remained "on the table" throughout the negotiations and when USX incorporated the Union's concessions in a typewritten proposed agreement, Rich and Phillips refused to sign the agreement unless USX gave them a favorable reply regarding the officials' pension demand. USX gave a favorable reply as to six Union officials, the Union

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[1] Several of USX's plants were permanently closed in 1984.

[2] The Basic Labor Agreement was renegotiated in 1987 and 1991.

negotiators signed the local agreement on December 24, 1983 and USX subsequently awarded the pensions.[3]

The local agreement at issue is known as the 1983 Fairfield Works Agreement ("FWA"). The FWA was used by USX to obtain concessionary local agreements at other facilities. The FWA abolished 500 Union rank-and-file jobs, permitted the Company to "contract out" work to non-Union firms, abolished certain craft jobs, cancelled pending grievance and arbitration proceedings, and in other ways took away rights that plaintiffs had under the 1983 BLA, saving the Company, by USX's own estimate, a net of more than $23.5 million dollars per year since 1983 in labor costs. More than $23.5 million dollars per year would have been paid to plaintiffs had they been recalled and compensated pursuant to the 1983 BLA and subsequent BLAs.

On March 5, 1985, about five months after the pensions were secretly awarded to the two Union negotiators (and four of their friends), Bruce Johnston, USX's Executive Vice President, wrote Lynn Williams, the Union's President, a letter (App. I, p. 190a-191a) stating that USX had changed its leave of absence policy and had granted pensions to six Union representatives. Williams did nothing in response to the letter but referred the letter to Kleiman, the Union's counsel. The Union asserted the attorney-client privilege concerning what Williams and Kleiman said to each other concerning the March 5, 1985 letter.

In January 1986, Kleiman told Union official Bruce Thrasher that Kleiman had no knowledge of any pension payments to Rich and Phillips.

In 1988, another official filed suit against USX and the Union in Alabama seeking pension benefits like those which Rich and Phillips had received. The suit alleged that Rich and Phillips had been awarded pension benefits during collective bargaining negotiations at Fairfield. In defense, the Union stated that "if

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[3] The value of the six pensions USX granted was approximately $500,000.

plaintiffs' allegations are taken as true" then "the collective bargaining agreement [pursuant to which other Union officials received pensions] . . . would be violative of . . . 29 U.S.C. § 186, and therefore unenforceable." In that action, the Union filed an affidavit of the Union's general counsel, Bernard Kleiman, stating that "as of January 30, 1986, Ralph Gurley, Thermon Phillips, E.B. Rich and Carl Statum were active employees of the International Union and *had not retired from USX.*" In its opinion below, the Court of Appeals noted that "Union attorney Bernard Kleiman swore in an affidavit that Rich, Phillips and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pension purposes, they had retired." (App. A, p. 23a.)

B. Proceedings Below

Plaintiffs filed this action in 1988 as a class action on behalf of USX employees in Jefferson County, Alabama represented by defendant Union from 1983 to the present. Plaintiffs assert that defendants conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.) by a pattern of racketeering activity including mail fraud, violations of 29 U.S.C. § 186 and obstruction of justice by the Union, through its general counsel, for filing the false affidavit in violation of 18 U.S.C. § 1503. Plaintiffs assert that the FWA should be declared void, that plaintiffs' rights under the 1983 BLA and subsequent national Basic Labor Agreements have been breached by the Company, that the Union failed to give plaintiffs fair representation because the Union representatives demanded and accepted bribes from the employer, USX, and that plaintiffs are entitled to relief under § 301(a) of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185).

After this civil action was commenced and some discovery had been taken, a federal grand jury returned indictments against USX, J. Bruce Johnston (USX's Executive Vice President), and E.B. Rich and Thermon Phillips (the two Union negotiators and

highly placed Union officials). After trial by jury, USX was convicted of conspiracy to influence Union officials, violations of 29 U.S.C. § 186, mail fraud and violations of ERISA. The two Union negotiators (Rich and Phillips) were convicted of conspiracy and violations of 29 U.S.C. § 186. USX was fined $4,105,000. The convictions of USX, Rich and Phillips were affirmed by the Court of Appeals. *U.S. v. Phillips,* 19 F.3d 1565 (11th Cir. 1994). Johnston has not yet been tried.

Prior to completion of discovery, the district court entered summary judgment against plaintiffs on the ground that a jury could not reasonably find that the bribes had influenced the Union negotiators or that the plaintiff rank-and-file employees had been damaged by defendants' actions. The Court of Appeals reversed on the grounds that a reasonable jury could conclude that the 1983 Fairfield Works Agreement was tainted by bribery, that the Agreement was voidable, and that a jury could find that plaintiffs had sustained damages.

Plaintiffs argued below that a jury could assess damages in favor of plaintiffs (a) based on the national collective bargaining agreement (the BLA) less the compensation which plaintiffs were paid under the illegally procured FWA or (b) based on defendant USX's savings or profits resulting from the illegally procured contract (FWA). Plaintiffs also argued that the jury could properly assess damages against the Union in the amount of dues which plaintiffs had, from 1983 to date of the removal of Rich and Phillips from office, paid to the Union in the expectation of receiving honest and faithful representation (which, of course, plaintiffs did not receive). The Eleventh Circuit's opinion appears to hold that plaintiffs have no right to recover compensation under the 1983 or subsequent BLAs. The court below refused to consider (1) whether plaintiffs were entitled to recover USX's illegal profits as damages and (2) whether plaintiffs were entitled to recover from the Union the dues which plaintiffs paid.

The district court and the Eleventh Circuit accepted as true the testimony of the two Union negotiators who accepted the bribes and the testimony of Company officials "that the USX negotiators had said USX could not afford to reopen the plant without concessions" and that at least some "concessions were caused by adverse economic conditions in the steel industry at the time." (App. A., p. 17a.) In its opinion, the Court of Appeals held that the Fairfield Works Agreement was "voidable," but stated:

> That does not mean, however, that the plaintiffs are entitled to recover the difference between what they were paid under the Fairfield Works Agreement and what they would have been paid under the Basic Labor Agreement. Upon rescinding a voidable contract, the plaintiffs are entitled "to the reasonable value of a performance rendered" to the Company. 6A Corbin, § 1535, at 822. "Reasonable value" is determined by the marketplace, free of illegitimate taint. It is clear that the rates provided for in the Basic Labor Agreement are not the reasonable market value the plaintiffs would have received for their labors, because it is undisputed that USX had shut down the facility rather than pay those rates. Instead, the proper measure of the value of the work done is the value that the parties would have agreed upon had the Union negotiators not violated their fiduciary duty. In other words, if a jury finds that the contract was voidable, the plaintiffs are entitled to recover the value of the concessions that the Union negotiators would have extracted from the company if the negotiators had not been pursuing their personal pension benefits.

(App. A, pp. 46a-47a.)

Moreover, the Court of Appeals (1) reversed the district court's order granting plaintiffs' motions to compel discovery of communications between the defendant Union's president (Williams) and general counsel (Kleiman) which the Union claimed were privileged attorney-client communications, and (2) af-

firmed the district court's order denying plaintiffs' motion to compel defendants to produce all grand jury transcripts in the possession of each defendant.

The Court of Appeals upheld the Union's assertion of the attorney-client privilege because plaintiffs had not satisfied each of the "good cause" indicia of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970, *cert. denied*, 401 U.S. 974 (1971), in that plaintiffs did not represent all or substantially all of the members of the Union. (App. A, pp. 52a-53a.) The Court of Appeals held, moreover, that the crime-fraud exception was not applicable because plaintiffs had not shown that the communications between Williams and Kleiman furthered the crime or fraud. (App. A. p. 55a.)

The Court of Appeals affirmed the district court's order denying plaintiffs' motion to compel defendants to produce grand jury transcripts in defendants' possession, on the ground that plaintiffs had "made no effort to identify those portions of the grand jury transcripts for which they have a particularized need." (App. A, p. 65a.)

REASONS FOR GRANTING THE WRIT

The decision below is the first to consider the question of the proper measure of damages available to union members who, but for a local collective bargaining agreement that was procured by bribery (and thus voidable), would have been compensated pursuant to a national collective bargaining agreement. The decision below (1) deprives plaintiffs of the benefit of a national collective bargaining agreement negotiated between an employer and a union, (2) permits USX, the employer, to retain the $23.5 million in profits realized by USX *each year* since 1983 as a result of the concessions obtained by bribing the two Union negotiators, (3) permits the Union to retain the dues which plaintiffs paid the Union from 1983 to 1990, notwithstanding the fact that the Union representatives accepted bribes and the Union covered up the bribes, (4) denies any remedy whatsoever to rank-and-file employees who lost their jobs as a result of concessions made by the bribed Union officials and (5) improperly shifts the burden to plaintiffs to prove the "value of the concessions that the Union negotiators would have extracted from the company if the negotiators had not been pursing their personal pension benefits." (App. A, p. 47a.)

This Court should grant certiorari to ensure that adequate *civil* remedies are available for racketeering acts. Criminal penalties alone are inadequate to deter bribes of Union officials. USX was fined $4,105,000 but was *benefited* by $23.5 million *each year* after 1983.

Plaintiffs respectfully submit that certiorari should be granted because the rulings below are contrary to federal labor and anti-racketeering policy, which is intended to prevent bribes and "sweetheart contracts" between employers and unions and to grant "complete relief" to employees injured thereby. The decision below is in conflict with the decisions of other Courts of Appeal and ignores or misconstrues decisions of this Court.

The Eleventh Circuit's opinion raises important issues concerning union members' ability to discover information related to criminal and fraudulent acts of their union and its officials, and whether a union may conceal its breaches of fiduciary duty and illegal acts of its officials from members of the union to whom the union owes a fiduciary duty by funneling all communications concerning illegal bribes through the union's general counsel and then asserting the privilege.

The decision below also unfairly allows defendants access to a treasurehouse of relevant facts (grand jury transcripts) while denying plaintiffs access to grand jury testimony and materials already in the possession of defendants.

This Court should review and reverse those rulings of the Eleventh Circuit.

I. THE DECISION BELOW IS CONTRARY TO FEDERAL LAW AND SHOULD BE REVIEWED BY THIS COURT

The decision below denies plaintiffs remedies to which plaintiffs are entitled in the following respects:

A. The Opinion Fails To Provide Adequate Relief To Employees Adversely Affected By A Bribery Scheme Between An Employer And A Union.

When Congress enacted the Labor Management Relations Act (LMRA), Congress included § 301(a) (29 U.S.C. § 185) to provide a means of enforcing collective bargaining agreements. In *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), the Court concluded that:

> the substantive law to apply in suits under § 301(a) is federal law, which the courts *must fashion from the policy of our national labor laws.*

Id. at 456. [Emphasis added.]

Congress intended to protect unionized workers from bribery of their union officials by outlawing such practices in 29 U.S.C.

§ 186. *U.S. v. Lanni*, 466 F.2d 1102 (3d Cir. 1972). Federal labor policy requires that injured employees be made whole. *Albermarle Paper Company v. Moody*, 422 U.S. 405, 419 (1975).

Bribery of union officials in violation of 29 U.S.C. § 186 is a predicate act under RICO. 18 U.S.C. § 1961(1)(C). This provision was intended to put "an end to labor racketeering in general and sweetheart contracts in particular." *Butchers' Union, Local 498 v. S.D.C. Investment, Inc.*, 631 F. Supp. 1001, 1008 (E.D. Cal. 1986). In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), this Court held that "RICO is to be read broadly" (*Id.* at 497) and "liberally construed to effectuate its remedial purposes." *Id.* at 498. For example, the United States Court of Appeals for the Sixth Circuit in *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1300 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074, *cert. denied*, 494 U.S. 1027 (1989) has recognized that:

> . . . a plaintiff injured by civil RICO violations deserves a "*complete recovery.*" [Citation omitted, emphasis added.]

The narrow civil remedy provided in the opinion below is contrary to the policy enunciated in 29 U.S.C. § 185 and in RICO regarding enforcement of national collective bargaining contracts where a local collective bargaining agreement which purports to modify the national agreement is tainted by bribery and voidable. Criminal penalties alone are clearly inadequate. USX was fined only $4,105,000. USX benefited by more than $23.5 million *each year* after 1983 from its bribery of the Union negotiators.

B. The Eleventh Circuit's Opinion Regarding Damages Relies On Evidence Presented By Defendants Which A Jury Could Properly Disbelieve.

The district court below concluded that "there was substantial evidence that the concessions were caused by adverse economic conditions in the steel industry at the time," and "that USX negotiators had said USX could not afford to reopen the plant without concessions." (App. A., p. 17a.) The Eleventh Circuit

noted that the district court's conclusion "apparently refers to the deposition testimony of the negotiators" (App. A., p. 17a), but failed to note that the jury could properly disregard the testimony of the Union and Company officials as biased and not worthy of belief. *N.L.R.B. v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (finder of fact may properly conclude that an employer's testimony that illegal layoffs would have occurred in any event, for economic reasons, was not worthy of belief).

There is evidence in this case that defendants' "economic defense" is pretext and that USX intended from the outset to reopen Fairfield Works to supply the new Pipe Mill when it was completed. Contrary to this evidence, and contrary to the requirements of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court of Appeals erroneously stated in its opinion that "the rates provided for in the Basic Labor Agreement are not the reasonable market value the plaintiffs would have received for their labors, because it is undisputed that USX had shutdown the facility rather than pay those rates." (App. A, p. 46a.) The 1980 Basic Labor Agreement (in force in 1981 when plaintiffs were laid off) was superseded in March 1983 by a new, concessionary BLA. Moreover, the 1981 appropriation request for the Pipe Mill clearly indicates that the Company planned to reopen Fairfield Works to supply the Fairfield Pipe Mill (scheduled for completion in late 1983 or early 1984) with molten steel produced at Fairfield Works.

C. The Eleventh Circuit's Decision Limiting Plaintiffs' Damages To The Fair Market Value Of Their Labor Denies Plaintiffs Their Contractual Rights Under The 1983 Nationwide BLA And Conflicts With Decisions Of Other Courts of Appeal.

Although the Court of Appeals found that the FWA was voidable, it also stated:

> That does not mean, however, that the plaintiffs are entitled to recover the difference between what they were paid

> under the Fairfield Works Agreement and what they would have been paid under the Basic Labor Agreement. Upon rescinding the voidable contract, the plaintiffs are entitled 'to the reasonable value of a performance rendered' to the company.

(App. A, p. 46a.)

Voiding of the FWA would not affect or rescind the March 1, 1983 BLA (a four-year nationwide collective bargaining agreement between USX and the Union). Plaintiffs have contractual rights under the BLA, and have a right to sue USX for violations of the BLA, pursuant to § 301 of the LMRA.

In *Textile Workers*, 353 U.S. at 451, this Court held that § 301(a) of the LMRA:

> authorizes federal courts to fashion a body of law for the enforcement of these collective bargaining agreements and includes within that federal law *specific performance of promises . . . under collective bargaining agreements.* [Emphasis added.]

The Eleventh Circuit's opinion ignores federal labor policy, which strongly favors the enforcement of the BLA (a national collective bargaining agreement) and § 301 of the LMRA, which provides employees with a remedy against an employer who violates a collective bargaining agreement. Moreover, the Eleventh Circuit's opinion is contrary to decisions of the Third, Fifth, Sixth and Seventh Circuits. See *Indiana Flooring Co. v. Grand Rapids Trust Co.*, 20 F.2d 63, 65 (6th Cir. 1927) ("A valid contract is not extinguished by an attempt to substitute therefor an invalid one."). Accord, *Fratelli Gardino, S.P.A. v. Caribbean Lumber Co.*, 587 F.2d 204, 208-09 (5th Cir. 1979) (when a contract modification is found illegal, damages are computed based on the terms of the original contract); 6 *Corbin on Contracts* § 1293 (1962) (when the modifying contract is voided, "[t]he prior claim then becomes enforceable."); *Restatement (Second) of Contracts*, § 275 cmt. b (1981).

The Eleventh Circuit's opinion also fails to recognize that "in some cases, expectancy or benefit of the bargain damages may be appropriate under RICO." *Fleischhauer*, 879 F.2d at 1300. In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), the Seventh Circuit held:

> [The provisions of the contract] supply an appropriate measure of the degree to which Liquid Air was injured by the RICO violations. *To restrict damages to the fair market value of the cylinders would deprive Liquid Air of its rights under the contract and would not compensate it for its losses. The damages that Liquid Air was entitled to under its contract with D&R provide the appropriate measure of full compensation.*

Id. at 1310. [Emphasis added.] See also *B.F. Hirsch v. Enright Refining Company, Inc.*, 751 F.2d 628, 634 (3d Cir. 1984) (the correct measure of damages under RICO was the expectation measure or benefit of the bargain, and damages should be calculated based on the terms of the contract.)

If the Eleventh Circuit's opinion is allowed to stand, the policies of the LMRA and RICO will be subverted because plaintiffs will be denied the benefit of the 1983 Basic Labor Agreement which had been agreed to by USX and the Union shortly before the bribery-tainted negotiations began which culminated in the voidable Fairfield Works Agreement.

D. The Opinion Of The Court Of Appeals Is Contrary To Decisions Holding That An Appropriate Measure Of Plaintiffs' Damages Is The Illegal Savings Or Profits Obtained By The Wrongdoers.

The opinion below does not afford plaintiff employees a "complete recovery," as Congress intended under RICO.

This Court has emphasized that the "focus on the remedial function of [RICO] is reinforced by the recurrent reference in the legislative debates to § 4 of the Clayton Act as a model for the

RICO treble-damages provision." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 241 (1987). Thus, the remedies available under RICO are similar to the private damage remedies in the Clayton Act, (15 U.S.C. § 15)[4] in which "Congress sought to create a private enforcement mechanism that would deter violators and *deprive them of the fruits of their illegal actions*, and would provide ample compensation to victims of antitrust violations . . ." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982). [Emphasis added.]

In adopting RICO, "The broader goal [of Congress] was to *remove the profit* from organized crime *by separating the racketeer from his dishonest gains.*" *Russello v. United States*, 464 U.S. 16, 28 (1983) (discussing RICO's forfeiture provision now found at 18 U.S.C. § 1963(a)(3)). [Emphasis added.] Accord, *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (attorney who bribed tax officials was required under RICO to forfeit all legal fees generated while the attorney was representing taxpayers before the bribed members of the tax board.)

Common law principles are applicable to RICO cases. *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, 112 S. Ct. 1311, 1317-1318 (1992). It is a matter of "simple fairness" for a wrong-doer to be required to give up any illegal profits he has reaped. *Pidcock v. Sunnyland America, Inc.*, 854 F.2d 443, 447 (11th Cir. 1988), in which the Eleventh Circuit held that plaintiff

> is entitled to a *presumption* that the damages he suffered as a result of the fraud are equal to the profits [the defendants] realized . . .

Id. at 448 [emphasis added]. See also *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1349 (S.D. Tex. 1976), in which the district court awarded damages, in an action brought under 15 U.S.C. § 13(c), equal to defendants' net profit from a bribe-

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[4] *Sedima*, 473 U.S. at 487.

tainted transaction. The same theory of recovery has been recognized in RICO cases. See *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 647 F. Supp. 1026, 1033 (N.D. Ill. 1986) ("the victim's loss is necessarily linked to the enterprise's gain").

If the opinion below is allowed to stand, the remedial policy of RICO will remain unfulfilled and plaintiffs will be denied a "complete recovery."

E. The Eleventh Circuit's Opinion Fails to Recognize That Plaintiffs Are Entitled To Recover Dues Paid To The Union For Faithful And Honest Services Which Plaintiffs Did Not Receive.

The Eleventh Circuit's opinion fails to recognize an important element of plaintiffs' damages. In the courts below, plaintiffs argued that members of plaintiff class had paid dues to the Union in anticipation of receiving faithful, loyal and honest representation, that the Union (which had a conflict of interest resulting from the bribes) did not provide such representation, and that plaintiffs were entitled, as one element of their damages, to recover as compensatory damages the dues which plaintiffs had paid the Union. The district court below had (erroneously) held that plaintiffs had waived any right to recover Union dues as compensatory damages and that plaintiffs' right to receive faithful and honest services from the Union was an intangible for which plaintiffs were not entitled to compensation under RICO. The Eleventh Circuit's opinion did not address the issue.

The *Restatement (Second) of Agency*, § 469 (1958) states the common law principles which are applicable:

> An agent is entitled to no compensation for conduct which is . . . a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed service for which no compensation is apportioned.

See *Wadsworth v. Adams*, 138 U.S. 380, 388-89 (1891); *Gussin v. Shockey*, 725 F. Supp. 271, 278 (D. Md. 1989), *aff'd*, 933 F.2d 1001 (4th Cir. 1991); *Cook County v. Lynch*, 620 F. Supp. 1256, 1258 (N.D. Ill. 1985) (bribed employee forfeits salary); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (in lawsuit involving bribery of union officials, the broad remedial purposes of RICO clearly permitted plaintiff business to recover compensatory damages for having "paid for services it never received."); *Restatement of Restitution* § 138(2). See also *Local 1814, Int'l Longshoreman's Assoc. v. N.L.R.B.*, 735 F.2d 1384, 1404-05 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984) (affirming NLRB's order requiring conflict-tainted union to refund union dues).

If this Court does not revise the opinion below, the remedial policy behind RICO will be ignored, the Union will benefit from its illegal racketeering activity, and plaintiffs will be denied the complete recovery to which plaintiffs are entitled.

F. The Opinion Of The Court Of Appeals Erred By Placing Upon Plaintiffs The Burden Of Proving What Position They Would Have Been In Had Their Union Representatives Not Been Influenced By The Illegal Benefits The Officials Sought For Themselves During The Negotiation Of The Fairfield Works Agreement.

The opinion of the Court of Appeals holds that (1) plaintiffs must " 'show that they would have returned to work under a less concessionary agreement absent the RICO violations,' " (2) "the proper measure of the value of the work done is the value that the parties would have agreed upon had the Union negotiators not violated their fiduciary duty" and (3) "plaintiffs are entitled to recover the value of the concessions that the Union negotiators would have extracted from the Company if the negotiators had not been pursuing their personal pension benefits." (App. A, pp. 18a, 46a-47a.) The Eleventh Circuit's opinion improperly im-

poses the burden of proof on plaintiffs, is contrary to the reasoning of this Court and decisions of the Fifth and Seventh Circuits, and ignores the remedial purposes of RICO and national labor policy.

Where the defendants' wrongdoing makes it difficult to separate the injuries caused by defendant's wrongdoing from injuries caused by economic circumstances, this Court has held that plaintiffs may present gross damages, and the burden of proving which damages, if any, were caused by economic circumstances shifts to the defendant. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 259-60 (1946) (reversing an appellate ruling that required plaintiffs to show what plaintiffs' earnings would have been in absence of the illegal acts.) See *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242-43 (7th Cir. 1982) (antitrust), *aff'd on other grounds*, 465 U.S. 752 (1984).

National labor policy requires that workers injured by violations of federal labor law be made whole. See e.g. *Albermarle*, 422 U.S. at 419. Under federal labor law, plaintiffs have only the burden of proving their gross damages; proof of facts which arguably reduce the amount of plaintiffs' damages is an affirmative defense. *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809, 812 (5th Cir. 1966); *J. H. Rutter Rex Manuf. Co., Inc. v. N.L.R.B.*, 473 F.2d 223, 241-42 (5th Cir. 1973), *cert. denied*, 414 U.S. 822 (1973). The same analysis applies in Title VII discrimination cases. See *Nord v. U.S. Steel Corp.*, 758 F.2d 1462, 1470 (11th Cir. 1985); *Pettway v. American Cast Iron Pipe Co..*, 494 F.2d 211, 259-60 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979).

In *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976), a Title VII case, the Court of Appeals for the Fifth Circuit held that:

> Once a court has determined that a defendant's inequitable conduct caused *some* damages to the class, or to a representative sample of its members, the burden falls on the wrongdoer to explain away or disprove the damages which each claimants' evidence arguably supports.

Id. at 1050. See also *Pettway*, 494 F.2d at 260-61 ("uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer"); *American Postal Workers Union Headquarters Local 6885 v. American Postal Workers Union AFL-CIO*, 161 L.R.R.M. 3406, 3411 (D.D.C. 1984) (where union improperly refused to allow its members to ratify a collective bargaining agreement, plaintiffs may offer evidence of plaintiffs' gross damages and the burden then shifts to defendants to prove otherwise).

Plaintiffs are entitled to an instruction to the jury and should be permitted to argue to the jury that if the jury finds the Fairfield Works Agreement voidable, the jury may award plaintiff employees the compensation to which plaintiffs were entitled under the BLA, less the amount plaintiffs received. Defendants then could offer evidence and argue which concessions were "necessary" to reopen Fairfield and which concessions were not affected by the bribes. This approach to damages is wholly consistent with the presumption (discussed in Section D above) that defendants' wrongful gain is a fair measure of plaintiffs' damages.

If the opinion below is allowed to stand, the policies behind RICO and national labor law will not be served because plaintiffs will be placed in the position of having to prove what would have happened in the absence of defendants' illegal acts of bribery.

G. The Language Of The Eleventh Circuit's Opinion May Be Read To Preclude Any Recovery By Those Plaintiff Class Members Who Were Not Recalled To Work Because Their Jobs Were Abolished Or Because Their Work Was Contracted Out Pursuant To The Tainted And Voidable FWA.

The Eleventh Circuit's opinion below recognizes that more than 500 job positions were abolished by the FWA and that the FWA contains many other concessions. The Eleventh Circuit's

statement that its holding that the FWA is voidable does not mean that plaintiffs are entitled to be compensated under the BLA, and that plaintiffs are only entitled to be paid the fair market value of their work when recalled to work, does not address the claims of, and might be construed so as to preclude *any* recovery by, those members of plaintiff class who were *not* recalled because their jobs were abolished or contracted out to a non-union firm pursuant to bribe-procured concessions made in the voidable FWA. This would be an unjust result. These employees could not, of course, prove the "value" of their services because they had been denied the opportunity to perform any work for USX by the bribery of their Union representatives.

The Eleventh Circuit's opinion also ignores (or precludes recovery for) claims of plaintiff class members who returned to work but were assigned lower-paying jobs because craft jobs were abolished or because USX was given full manning discretion by the tainted FWA. The Eleventh Circuit's opinion could be interpreted so as to exclude recovery of incentive pay (based on production) that was protected under the 1983 and subsequent BLAs. Finally, the Eleventh Circuit's opinion does not discuss plaintiffs' "implementation" injury — that is, the damages suffered by plaintiffs because plaintiffs were deprived of adequate, impartial representation in connection with the post-1983 grievance and arbitration proceedings, in which the Union members were represented by Union officials who were secretly receiving bribes each month pursuant to their illegal agreement with USX.[5]

II. THE ELEVENTH CIRCUIT'S OPINION UPHOLDING THE UNION'S ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE REVIEWED AND REVERSED BY THIS COURT

In violation of 29 U.S.C. § 186, two Union representatives requested and were paid pension benefits ("things of value") by

[5] Even after they were indicted, the Union kept Rich and Phillips in their high Union offices until their sentencing in September 1990.

USX during the 1983 negotiations of the Fairfield Works Agreement and subsequent implementation and enforcement of the Agreement, and in July 1990 were convicted for their illegal acts. The Union has asserted the attorney-client privilege and has stonewalled plaintiffs' attempts to learn when the Union learned of its officials' illegal acts, what action, if any, the Union took after receipt of the March 1985 letter from Johnston, what the basis was for the Union's action or inaction, and why the Union maintained and supported Rich and Phillips in their powerful positions.

Whether the Union, an unincorporated association of its members, may assert the attorney-client privilege so as to deny plaintiffs, Union members, access to information related to illegal acts and breaches of fiduciary duty by the Union and its officials should be considered by this Court. The Eleventh Circuit's decision has serious implications for beneficiaries who are the victims of a fiduciary's criminal, fraudulent and tortious acts.

A. The *Garner* Exception.

Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), established an exception to the attorney-client privilege based on the relationship between a fiduciary and its beneficiaries where "the [fiduciary] is in suit against its [beneficiaries] on charges of acting inimically to [beneficiary] interests." *Id.* at 1103. At the heart of *Garner* was consideration of who is actually the attorney's "client," and the principle that the fiduciary's judgment "must stand on its own merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised." *Id.* at 1101.[6] In this case,

[6] This Court has never considered the fiduciary exception established in *Garner*, and denied the *Garner* plaintiffs' August 31, 1970 Petition for Writ of Certiorari, in which plaintiffs had argued that the requirement of a showing

(Footnote 6 continued on next page)

the Eleventh Circuit held that the *Garner* exception did not apply because:

> Although many of the factors listed in *Garner* appear to support the plaintiffs' argument that there is good cause for discovery, two factors foreclose it: the fact that only a tiny percentage of the defendant Union's members are members of the plaintiff class; and the fact that the interest of the plaintiff class is adverse to those who are not in the class.

App. A, pp. 52a-53a.

The Eleventh Circuit's decision limits *Garner* to actions in which the fiduciary's wrongdoing adversely affects all or almost all beneficiaries, places undue weight on the number of plaintiffs who seek the information, and ignores the fiduciary duty which the Union owes rank-and-file members.[7] The Eleventh Circuit's decision is contrary to the interests of over 5000 rank-and-file Union members, for whose benefit the Union's president and general counsel should have been acting, and is in conflict with decisions of the Fifth Circuit and other federal courts.

As Prof. Vincent C. Alexander points out in *Corporate Privilege Study,* 63 St. John's Law Review 191, 364 (1981):

(Footnote 6 continued)

of "good cause" placed an improper and unreasonable burden on beneficiaries and on trial courts. Since that time, several federal courts have held that the *Garner* indicia of good cause serve a legitimate need only in the corporate context, and not in a trustee relationship. See *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Star Company,* 543 F. Supp. 906, 909 n.5 (D.D.C. 1982) ("In a trustee relationship . . . there exists no legitimate need for a trustee to shield his actions from those whom he is obligated to serve. In other words, while corporate managers perform duties which 'run to the benefit *ultimately* of the stockholders,' *id.* at 1101 [emphasis added], a pension plan trustee *directly* serves the fund beneficiaries"); see also *Petz v. Ethan Allen, Inc.,* 113 F.R.D. 494, 497 (D. Conn. 1985); *Helt v. Metropolitan District Commission,* 113 F.R.D. 7, 10 n.2 (D. Conn. 1986).

[7] The Union clearly stands in a fiduciary relationship with its rank-and-file members. See, *Airline Pilots Assoc., Int'l v. O'Neill,* 499 U.S. 65 (1991) *(per curiam).*

> Shareholder interests in disclosure are not dependent upon an absolute identity of interest between the shareholders and the corporation. Rather they flow from the fiduciary duties owed to the shareholders by management. These duties are owed regardless of whether the suit seeks derivative or personal relief, a point that is underscored by the increasing number of decisions that have applied *Garner* in other types of fiduciary relationships.

In the context of a pension fund, "when an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries." *Washington-Baltimore Newspaper Guild,* 543 F. Supp. at 909 (D.D.C. 1982); See also *Petz,* 113 F.D.R. 494, 497 (D. Conn. 1985); *Helt,* 113 F.R.D. 7, 9 (D. Conn. 1986).

Similarly, when an attorney advises a union or a union official concerning matters relating to the union's duty of loyalty to union members, the attorney's advice should be sought and given for the benefit of the union members, not for the benefit of particular union officials. Communications between the Union's president and Union counsel which relate to bribes paid high-placed Union officials and illegal misconduct by the Union and its officials should be discoverable by rank-and-file Union members. The decision of the Court of Appeals is contrary to the Union's duty of undivided loyalty to its members. While no Court of Appeals has considered the *Garner* exception in a labor union context, several district courts have found the *Garner* exception applicable to such cases.[8]

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[8] *Nellis v. Air Line Pilots Assoc.,* 144 F.R.D. 68 (E.D. Va. 1992) (finding that *Garner* applies in the context of a class action by 2,400 union members against their national union); *Aguinaga v. John Morrell & Co.,* 112 F.R.D. 671 (D. Kan. 1986) (finding that *Garner* applies in the context of a class action by union members against their international union and local union); *Boswell v. IBEW Local* 164, 106 L.R.R. M. (BNA) 2713, 1981 WL 27188 (D.N.J. 1981).

The opinion below, contrary to decisions of the Fifth Circuit,[9] appears to limit *Garner* to derivative actions and class actions on behalf of *all* beneficiaries. However, the Union representatives' bribery and breaches of fiduciary duty by the Union and its representatives violated the duty of loyalty which the Union and its officials owed to all rank-and-file Union members employed by USX at Fairfield Works. If permitted to stand, the Eleventh Circuit's decision will permit a union to commit illegal acts and breaches of fiduciary duty directed to union members at only one or two steelmaking facilities and to conceal behind the attorney-client privilege information related to those acts.

Moreover, the Eleventh Circuit's holding, that *each* of the *Garner* indicia must be met is contrary to public policy and well-reasoned precedent.[10]

This Court should review and reverse the decision below as to *Garner* in order to insure uniform application of the fiduciary/beneficiary exception to the attorney-client privilege.

B. The Crime-Fraud Exception.

The bribed Union officials and USX have been convicted of violations of 29 U.S.C. § 186, and the Eleventh Circuit found that the Union itself can be held liable for breach of its duty of fair representation and for violations of RICO. The communications

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[9] *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (refusing to limit the *Garner* exception to derivative suits), *cert. denied*, 490 U.S. 1065 (1989); *In re Int'l Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1239 n.3 (5th Cir. 1982).

[10] *Ward*, 854 F.2d 780, 784 (5th Cir. 1988) (*Garner* "set forth a *non-exclusive* list of indicia that 'may contribute to the decision of presence or absence of good cause,'" [emphasis added]). See also *Garner v. Wolfinbarger*, 56 F.R.D. 499, 504 (S.D. Ala. 1972) ("It is this Court's opinion that the *facts set out in any one* of paragraphs 1 through 7, *considered alone*, would constitute a sufficient basis for granting plaintiffs' motion." [Emphasis added.])

between Williams (the Union's president) and Kleiman (the Union's general counsel) with respect to J. Bruce Johnston's March 5, 1985 letter to Williams relate directly to the Union's knowledge, participation in the cover-up, and involvement in the illegal, fraudulent, and tortious activities of the convicted Union representatives (Rich and Phillips) and the convicted Company. The Eleventh Circuit found, however, that the crime-fraud exception did not apply because it concluded (erroneously) that plaintiffs had failed to produce evidence that the communications "furthered or were closely related to an effort on the Union's part to conceal the illegal actions of its negotiators." (App. A, p. 55a.)

The Eleventh Circuit's decision raises important issues, never before addressed by this Court, including (1) the degree of proof required to show that "the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it" and (2) whether plaintiffs must establish *both* prongs of the test or may show either that the attorney's advice "was in furtherance of" *or* was "closely related to" the criminal activities of the client. See, e.g., *In re Grand Jury Investigation* (*Schroeder*), 842 F.2d 1223, 1226 (11th Cir. 1987).

In *Clark v. United States,* 289 U.S. 1, 15 (1933), this Court held that "to drive the privilege away, there must be 'something to give colour to the charge'; there must be *prima facie* evidence that it has some foundation in fact." In *United States v. Zolin,* 491 U.S. 554, 569 and n.7 (1989), this Court did "not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception," but recognized that "the phrase '*prima facie* case' has caused some confusion," and held:

> No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true . . . of . . . situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end.

Id. at 569. In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 354 (1985), this Court recognized, in finding that a bankruptcy-trustee has control of the bankrupt corporation's attorney-client privilege, as to the crime-fraud exception:

> The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. See *Clark v. United States, supra*, 289 U.S., at 15, 53 S. Ct., at 469. Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing.

The Eleventh Circuit's decision below appears to hold that plaintiffs must show that (a) the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity *and* (b) that such assistance was closely related to the criminal or fraudulent activity. That holding would permit the attorney-client privilege to be used to facilitate crimes, frauds or torts and the concealment of crimes and frauds, particularly where, as here, the attorney-client privilege is used as a means to *conceal* fiduciary misconduct, and thereby carry out and avoid public detection of the crime or fraud. This Court should review and reverse the Eleventh Circuit's decision upholding the Union's assertion of the attorney-client privilege notwithstanding plaintiff's *prima facie* showing as to the crime-fraud exception.

III. THE ELEVENTH CIRCUIT'S DECISION CONCERNING DISCOVERY OF GRAND JURY MATERIALS ALREADY IN THE POSSESSION OF DEFENDANTS IS IN CONFLICT WITH DECISIONS OF THREE OTHER CIRCUITS AND SHOULD BE REVIEWED AND REVERSED BY THIS COURT

In this action, grand jury transcripts taken in a related criminal proceeding are in the possession of the three defendants, only one of which was a criminal defendant. The criminal trial of USX and the Union officials concluded in their convictions. The acts

complained of by plaintiffs' Amended Complaint go back as far as 1983. Some witnesses have become seriously ill or died, many other witnesses have claimed they do not recall important facts and all of the Fairfield Six and Johnston have refused to testify in this action pursuant to the Fifth Amendment. Plaintiffs and their counsel have not seen the grand jury transcripts, and cannot use the grand jury testimony to refresh recollections or as an aid in discovery and cross-examination. The defendants, however, have possession of these documents[11] and have an unfair advantage in being able to use these documents in discovery, preparation for trial and in the trial of this action. The Eleventh Circuit, nevertheless, affirmed the district court's denial of plaintiffs' motion under the Federal Rules of Civil Procedure to compel production of those grand jury transcripts and documents on the grounds that "plaintiffs have made no effort to identify those portions of the grand jury transcripts for which they have a particularized need," App. A, p. 65a, citing *Allis-Chalmers Mfg. Co. v. City of Fort Pierce*, 323 F.2d 233, 242 (5th Cir. 1963).[12]

The Eleventh Circuit's decision not only conflicts with decisions of three other circuits, but also places unreasonable burdens on the courts and on parties seeking discovery of grand jury material already in the possession of an opponent.

This petition presents the issue whether one civil litigant can be denied equal access to "a storehouse of relevant fact" already in the possession of all opposing parties in the action.

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[11] The defendant Union has obtained access to grand jury transcripts without having been required to make a showing of "particularized need"; and it is unfair to impose such burdens on plaintiff when a defendant such as the Union has been given access to transcripts of grand jury testimony.

[25] This case involves plaintiff's request, pursuant to Rule 34, Fed. R. Civ. P., that each defendant produce relevant documents already in the possession of defendants. Plaintiffs have not sought grand jury transcripts or documents from the grand jury pursuant to Rule 6(e), Fed. R. Crim. P.

In *Dennis v. United States,* 384 U.S. 855 (1966), in the context of a criminal action, this Court recognized that "particularized need" has been shown where the movant has shown that one side has exclusive access to grand jury materials. In *Dennis,* this Court held that "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Id.* at 873. In the context of civil actions, three circuits have held, contrary to the decision below, that, where one civil litigant is denied access to the grand jury materials in the possession of opposing litigants, a sufficient showing of a "particularized need" has been made without imposing a requirement that the movant demonstrate, on a witness by witness and line by line basis, a need for particular grand jury testimony. See *In re Grand Jury Proceedings,* 800 F.2d 1293 (4th Cir. 1986), in which the Fourth Circuit held that "particularized need" for grand jury material for purposes of impeachment and refreshing recollections "becomes 'strong' both for purposes of trial preparation and for trial itself, *when there has been prior unlimited release to one party in the litigation of the grand jury transcript and materials,*" [emphasis added] *id.* at 1302, and further stated:

> In that case, disclosure is in order not merely to assure the accuracy of the testimony but also "to equalize the access to relevant facts which each side possesses" and to eliminate the obvious unfair advantage, arising from affording only one side "exclusive access to a storehouse of relevant fact." Beyond this, it is contrary to the wholesome spirit of modern federal procedure to deny to one party evidence available to the other party. Such a procedure is too much like providing arms to one adversary and denying it to the other.

Id. at 1303.[13]

The decision below contemplates use of an *in camera* analysis which was disapproved of by this Court in *Dennis.* In *Dennis,* this Court held that "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony." 384 U.S. at 874. This Court further recognized that the *in camera* process involves judgments and analyses concerning the utility of material which are most appropriately made by counsel and not the court:

> Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

Id. at 874-875.

The Eleventh Circuit's decision unfairly gives defendants exclusive access to "a storehouse of relevant fact," and the unfair advantage of being able to use grand jury materials in preparation for trial and at trial, while depriving plaintiffs of information which would be helpful in discovery, cross-examination, and refreshing the recollection of witnesses. The Eleventh Circuit's decision imposes an unreasonable burden on the parties and on the courts. This Court should grant certiorari and reverse the Eleventh Circuit's decision denying plaintiffs' motion to compel defendants to produce any transcripts of testimony and documents given to the grand jury which are in defendants' possession.

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[13] See also *State of Illinois v. Sarbaugh,* 552 F.2d 768, 777 (7th Cir. 1977), *cert. denied,* 434 U.S. 889 (1977); *Petrol Stops Northwest v. Continental Oil Co.,* 647 F.2d 1005, 1008 (9th Cir.), *cert. denied,* 454 U.S. 1098 (1981).

CONCLUSION

The opinion of the Court of Appeals is contrary to the remedial purposes of RICO and the national labor policy. If this Court does not revise the opinion below, a large number of plaintiff class members who have suffered the greatest damages may be barred from presenting their claims for damages to the jury. That would be a harsh and unjust result.

This Court should grant certiorari and review and revise the April 5, 1994, decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 91-7215, 92-6218

Leslie Ray COX; R.M. Cox; Larry Driver; Barry Nichols; John Bullard; Robert W. Kennedy, Jr.; Lorenzo G. East; Clarence M. Pope, Jr.; C.R. Altes; Jack E. Merrymon; Terry P. West; R.S. Arnold; M.W. Milstead; J.W. Wade; Manning A.C. Snider; Terry H. Melvin; Thomas E. Hill; Gary D. Swann; Ronald E. Frazier; Anthony J. Crapet; Robert M. Green; Heath L. McMeans, III; Billy Carter; Joe A. Knight; George Boglin, Wardell Clark, Phillip L. Drummond, Don L. Flurry, Dennis R. Fulton, Dennis E. Jones, W.T. Mayberry, James R. Miller, Willie J. Nation, Oscar Lee Perry, Robert Poole, Brack Wells, Willie Young, Harry S. Turner,

Plaintiffs-Appellees, Cross-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE and United States Steel & Carnegie Pension Fund,

Defendants,

United Steelworkers of America, AFL-CIO-CLC and USX Corporation, a/k/a United States Steel Corporation,

Defendants-Appellants, Cross-Appellees.

Leslie Ray COX, R.M. Cox, Larry Driver, Barry Nichols, John Bullard, Robert W. Kennedy, Jr., Lorenzo G. East, Clarence M. Pope, Jr., C.R. Altes, Jack E. Merrymon, Terry P. West, R.S. Arnold, M.W. Milstead, J.W. Wade, Manning A.C. Snider, Terry H. Melvin, Thomas E. Hill, Gary D. Swann, Ronald E. Frazier, Anthony J. Crapet,

Robert M. Green, Heath L. McMeans, III, Billy Carter,
Joe A. Knight, George Boglin, Wardell Clark,
Phillip L. Drummond, Don L. Flurry,
Dennis R. Fulton, Dennis E. Jones, W.T. Mayberry,
James R. Miller, Willie J. Nation, Oscar Lee Perry,
Robert Poole, Brack Wells, Willie Young, Harry S. Turner,
Plaintiffs-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL &
CARNEGIE, United States Steel & Carnegie Pension Fund,
USX Corporation, a/k/a United States
Steel Corporation,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama.

OPINION

April 5, 1994.

Carl B. Frankel, Associate Gen. Counsel, United Steelworkers of America, Pittsburgh, PA, Robert M. Weinberg, Jeremiah A. Collins, Martin S. Lederman, Bredhoff & Kaiser, Washington, DC, Jerome A. Cooper, Joe R. Whatley, Jr., Franklin G. Shuler, Jr., Cooper, Mitch, Crawford, Kuykendall & Whatley, Birmingham, AL, for United Steelworkers of America in No. 91-7215.

Michael L. Lucas, Burr & Forman, William N. Clark, Redden, Mills & Clark, Birmingham, AL, Leonard L. Scheinholtz, Robert W. Hartland, Reed, Smith, Shaw & McClay, J. Michael Jarboe, USX Corp., Pittsburgh, PA, for USX Corp. in No. 91-7215.

J. Vernon Patrick, Jr., Alexander S. Lacy, William M. Acker, III, Elizabeth N. Pitman, Patrick & Lacy, P.C., Samuel Maples,

Michael H. Bite, Jr., Bite, Bite and Bite, Birmingham, AL, for appellees in No. 91-7215 and appellants in No. 92-6218.

F.A. Flowers, III, Michael L. Lucas, Richard Arthur Freese, Burr & Forman, Birmingham, AL, Billy M. Tennant, S.G. Clark, USX Corp., Legal Dept., Pittsburgh, PA, Jeremiah A. Collins, Martin S. Lederman, Robert M. Weinberg, Bredhoff & Kaiser, Washington, DC, Carl B. Frankel, Associate Gen. Counsel, United Steelworkers of America, Pittsburgh, PA, Samuel H. Heldman, Joe R. Whatley, Jr., Cooper, Mitch, Crawford, Kuykendall & Whatley, William N. Clark, Redden, Mills & Clark, Birmingham, AL, Robert W. Hartland, Leonard L. Scheinholtz, Reed, Smith, Shaw & McClay, Pittsburgh, PA, for appellees in No. 92-6218.

Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

CARNES, Circuit Judge:

This case arises out of the negotiations between the USX Corporation ("USX" or "the Company"), formerly known as United States Steel, and the United Steelworkers of America ("the Union") leading to the 1983 Collective Bargaining Agreement governing operations at the USX steel mill in Fairfield, Alabama ("the Fairfield Works"). The plaintiffs-appellees, who are or were Union members and employees at the Fairfield Works, brought this suit against USX, the administrator of the United States Steel and Carnegie Pension Fund ("the Fund"), and the Union, alleging that the Union negotiators covertly requested and received pension benefits from the Company to which they were not entitled and that, as a result, the Union negotiators agreed to concessions that damaged the plaintiffs. The district court granted summary judgment to the defendants

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* Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

on several of the plaintiffs' claims, and certified its decision for appeal. We review that decision, along with several of the court's rulings on discovery matters.

In part I, we discuss the facts and prior proceedings of the case as background. In part II, we review the district court's grant of summary judgment for the defendants and explain why we reverse that ruling. More specifically, we discuss the standard of review in subpart A, then we analyze the plaintiffs' RICO claim in subpart B and, in subpart C, their breach of contract claim against USX under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185 (1978 & Supp. 1993). In part III, we review various rulings of the district court on discovery. After explaining in part IV our lack of jurisdiction to review the district court's decision not to certify a plaintiff class as to the claim for equitable relief, we conclude in part V.

I. BACKGROUND

The Fairfield Works steel mill in Jefferson County, Alabama, had been closed, and its approximately 2,600 employees laid off, for over a year when, in September 1983, USX and the Union sought to reach an agreement under which the mill could be reopened. William Miller, USX Vice President for Labor Relations, headed the USX negotiating team. The Union was represented by Thermon Phillips, a member of the Union's International Executive Board and Director of District 36 (which includes Alabama) and by E.B. Rich, a sub-director of District 36. Both Phillips and Rich had left USX to work for the Union years before; neither had been with the Company long enough to qualify for a pension.

The plaintiffs allege that shortly after the negotiations began, Rich took Miller aside and gave him a note demanding that the Company grant retroactive leaves of absence to a few specified Union representatives (including themselves), so that the years they had spent working for the Union would be counted for

pension purposes as years spent with USX and they would therefore become eligible for USX pensions. According to the plaintiffs, the Union negotiators surreptitiously informed Miller that their agreement to any concessions at Fairfield was conditioned on their receiving Company pensions.

The final Fairfield Works Agreement ("the Agreement" or "FWA"), reached on Christmas Eve, 1983, did include sizable concessions, although the Union argues that USX acceded to numerous Union demands before the Agreement was reached, and USX argues that in return for Union concessions it committed itself to making substantial capital investments to modernize the mill. Under the Agreement, more than 500 jobs were eliminated; local working conditions rules (governing such matters as job assignments and crew sizes) were abolished altogether, giving the Company sole discretion in determining job assignments; all pending complaints, grievances, and arbitration cases were dismissed; maintenance and janitorial jobs were contracted out; and salary guarantees and certain types of incentive pay were dropped. Towards the end of the negotiations, one USX official estimated that the Agreement would yield savings of 23.5 million dollars per year. The plaintiffs assert that Rich and Phillips refused to sign the final agreement until USX covertly agreed to their pension demands. Miller testified in deposition that the Union negotiators signed the Agreement after he told them that he was under the impression that their pension request "would be considered favorably" but that he "could not assure them of that."

In 1984, after the Agreement went into effect, Rich contacted USX numerous times to inquire about the status of the pension request. In the fall of 1984, the USX Corporate Policy Committee approved a unilateral change in policy to allow approval of indefinite retroactive leaves of absence for former employees who had left to work for the Union. J. Bruce Johnston, Executive Vice President of Employee Relations, proposed the change,

writing to the Committee that "it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the [Union]." Shortly thereafter, the Company approved pensions for six of the Union officials that Rich had named during the negotiations (referred to by some as the "Fairfield Six"), including Rich and Phillips themselves.[1] Thus, Rich and Phillips received for themselves and for others that which they had covertly demanded during the negotiations. In November 1984, USX began paying the Fairfield Six their pensions, which were awarded retroactively to February 29 of that year. However, USX did not directly inform the potential beneficiaries, other than the Fairfield Six, of the change in its leave-of-absence policy. In March 1985, Johnston did write a letter to Union president Lynn Williams, informing him that "United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis." The letter also states that, "[p]ursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives." The Union apparently did not inform any of its other representatives or members of the change in policy, so that the Fairfield Six were the only ones who received pensions under the new policy.

In May 1988, after several other Union representatives heard rumors of the benefits the Fairfield Six were receiving, and applied for similar pensions, the United States Steel Fund sent a letter to the Fairfield Six informing them that it would begin depositing their benefits into escrow accounts. According to the letter, recent decisions by the Second, Third, and Fifth Circuits "raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union offi-

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[1] The other members of the Fairfield Six are Ralph Gurley, Carl Statum, Virgil Pearson, and Fred Shepard.

cials to receive credit for pension purposes for extended periods they spend in the service of the Union." The letter explained that "in light of current legal developments," continued payment of the benefits could subject the Fairfield Six, USX, and the Funds "to criminal liability."

In 1990, as a result of their actions concerning the negotiations and pensions, USX, Rich, and Phillips were convicted of violating 29 U.S.C.A. § 186 (1978 & Supp. 1993). Subsection (a) of that statute prohibits "any employer" from paying, lending, or delivering "any money or thing of value" to "any representative of any of his employees who are employed in an industry affecting commerce." 29 U.S.C.A. § 186(a)(1) (1978 & Supp. 1993). Subsection (b) makes it "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money, or other thing of value prohibited by subsection (a) of this section." 29 U.S.C.A. § 186(b)(1) (1978 & Supp. 1993). The appeal of those convictions is pending before this Court.

Thirty-eight present and former USX employees brought this suit in the Northern District of Alabama, seeking monetary damages and equitable and declaratory relief for a class of similarly situated workers. The final amended complaint asserted five claims against USX, the Fund, and the Union. Count One alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961 *et seq.* Count Two alleged that the Union breached its contractual duties, in violation of the Labor Management Relations Act (LMRA) § 301, 29 U.S.C.A. § 185(a). Count Three alleged that USX and the Union committed an unfair labor practice in violation of the National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151 *et seq.*, by failing to negotiate in good faith. Count Four alleged that the defendants violated their fiduciary duties under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001 *et seq.*, by failing to notify the

plaintiffs or the Department of Labor of the change in the Company's leave policy. Finally, Count Five alleged violations of 29 U.S.C.A. § 186, and sought an order enjoining the defendants from future violations.

The district court certified a plaintiff class, with respect to the damages claims only, of all those who were employed by USX in Jefferson County, Alabama, and represented by District 36 of the Union at any time between July 1, 1983, and August 14, 1990. The court, citing "the substantial conflicts within the class" over the plaintiffs' request that the Agreement be rescinded, declined to certify a plaintiff class with respect to the plaintiffs' claims to equitable relief. During the course of discovery, the plaintiffs deposed Lynn Williams, president of the International Union, and asked him about the letter he had received from J. Bruce Johnston in March of 1985, informing him of USX's change in the leave-of-absence policy. Williams testified that he made no inquiry upon receiving the letter, but "had some conversation about it" with the Union's attorneys. Plaintiffs' counsel then asked Williams "What did you say and what did they say on that occasion about the March 5, 1985 letter?" The Union's counsel instructed Williams not to answer on the ground that the information sought was protected by the attorney-client privilege. After the plaintiffs moved for an order compelling Williams to respond to the question, the district court determined that the answer was discoverable and, on January 10, 1991, ordered that Williams answer. The court then certified the Union's appeal from that order, and we grated the Union's petition for permission to appeal.

Also during the course of discovery, USX objected to some of the plaintiffs' deposition questions, document requests, and interrogatories, on the ground that the information sought was protected by the attorney-client privilege. When the plaintiffs filed a motion to compel USX to respond, the district court determined that USX, by asserting the defense that it had

intended to act in compliance with the law, waived the privilege with respect to those communications bearing on the question of USX's intent in awarding pension credits to Union officials. Accordingly, the court granted the plaintiffs' motions to compel USX to produce materials bearing on USX's knowledge of the legality of its actions. The district court certified USX's appeal from that order and we granted USX leave to appeal, consolidating the two discovery appeals into one and giving it number 91-7215.

The district court granted the defendants' motion for summary judgment on the plaintiffs' claims under RICO and claims under LMRA § 301 against both USX and the Union, on the ground that the plaintiffs had failed to show that the discussions about pension credits had caused them any injury. The district court dismissed the unfair labor practice claim on the ground that the National Labor Relations Board has exclusive jurisdiction over such claims. The district court also granted the Union's motion for summary judgment on the plaintiff's ERISA claim against the Union. The district court entered final judgment on those claims as to which summary judgment was granted, with the exception of the claim against the Union for violation of the duty of fair representation under LMRA § 301, which is therefore not before this Court. In appealing that final judgment, the plaintiffs have abandoned the ERISA claim against the Union and NLRA claims. They appeal only the award of summary judgment on the RICO claim and the § 301 claim against USX for breach of contract; they also appeal a number of discovery orders the district court entered prior to summary judgment. That appeals bears number 92-6218, and has been consolidated with the discovery appeal, number 91-7215.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

A. THE STANDARD OF REVIEW

[1-3] We review a "grant[ ] of summary judgment de novo, applying the same legal standard applied by the district court in the first instance." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1117 (11th Cir. 1993). Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury junctions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. at 2513 (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). In other words, "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton,* 883 F.2d 923, 933-34 (11th Cir. 1989).

[4-6] The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. at 2553. With regard to issues on which the non-moving party bears the burden of proof, the moving party need not support its

motion with evidence "negating the opponent's claim." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115-16 (11th Cir. 1993) (quoting *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437-38 (11th Cir. 1991) (*en banc*)). Once the moving party has carried its burden, the non-moving party must show the existence of a genuine issue of material fact to avoid summary judgment. *Id.*

B. THE RICO CLAIM

[7-8] The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964(c) (1984 & Supp. 1993), provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Thus, to recover on a civil RICO claim, the plaintiffs must prove, first, that § 1962 was violated; second, that they were injured in their business or property; and third, that the § 1962 violation caused the injury. *Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied,* __ U.S. __, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992). Those who violate § 1962 are

> those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

Pellstier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991). "Racketeering activity" includes violations of 29 U.S.C.A. § 186, which restricts the payments for which a union representative can ask and which a union representatives and his employer can give. 18 U.S.C.A. § 1961(1)(C) (1984 & Supp. 1993); 29 U.S.C.A. § 186 (1978 & Supp. 1993).

1. Violation of § 1962

USX argues that the plaintiffs failed to create a genuine issue of material fact about the existence of a violation of § 1962, which is the first element of a civil RICO claim, and the Union has adopted USX's arguments. First, USX argues that the plaintiffs did not proffer sufficient evidence of the existence of a "pattern of racketeering activity." Even as to the allegations, according to the Company, the "[p]laintiffs allege nothing more than a single, uncomplicated episode of alleged wrongdoing in the nature of an alleged 'garden-variety' act of extortion or bribery," and a single act cannot constitute a "pattern." Second, and in the alternative, USX argues that even if the plaintiffs have met their burden of pleading and have proffered sufficient evidence concerning the existence of a pattern of racketeering activity, they have failed to meet their burden with respect to the other elements required under § 1962(a), (b), or (c). We address these two contentions in turn.

a. The Pattern of Racketeering Activity

[9] A "pattern of racketeering activity," for purposes of the RICO Act, "requires at least two acts of racketeering activity," 18 U.S.C.A. § 1961(5) (1984 & Supp. 1993), and the Supreme Court has observed that "two isolated acts of racketeering activity do not constitute a pattern." *Sedima, S.P.R.L. v. Imrex Co*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285, n. 14, 87 L.Ed.2d 346 (1985). Instead, "'[i]t is the factor of *continuity plus relationship* which combines to produce a pattern.'" *Id.* (quoting

S.Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis added)). More recently, the Court has expanded on the definition of "continuity" and "relationship." Borrowing from Title X of the Organized Crime Control Act of 1970, the Court has explained that predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc. v. Northwestern Bell Tel. Co,* 492 U.S. 229, 240, 109 S.Ct. 2893, 2901, 106 L.Ed.2d 195 (1989) (quoting 18 U.S.C. § 3575(e)). As for 'continuity,' the Court explained:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept — and particularly so in the RICO contest, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . . .

Id. at 241-42, 109 S.Ct. at 2902.

We have held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts," *Bank of America v. Touche Ross & Co.,* 782 F.2d 966, 971 (11th Cir. 1986), as long as "each act constitutes a separate violation of the state or federal statute governing the conduct in question," *United States v. Watchmaker,* 761 F.2d 1459, 1475 (11th Cir.

1985) (internal quotations omitted), *cert. denied,* 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986). "'If distinct statutory violations are found, the predicate acts will be considered to be distinct *irrespective of the circumstances* under which they arose.'" *United States v. Gonzalez,* 921 F.2d 1530, 1545 (11th Cir. 1991) (quoting *Bank of America,* 782 F.2d at 971).

[10] As the district court properly recognized, that which USX argues is a single episode of bribery could be viewed by a jury as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity. Each monthly payment of pension benefits to the Fairfield Six could be interpreted as a "thing of value" for purposes of 29 U.S.C.A. § 186, and therefore as a separate predicate act for purposes of RICO. *See, e.g., United States v. Boffa,* 688 F.2d 919, 935-36 (3d Cir. 1982) (holding that a reasonable jury could find that each monthly lease payment made to secure use of an automobile for a union official for four months constituted a separate predicate act under RICO), *cert. denied,* 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). The jury could easily determine from the proffered evidence that the payments are connected by a common scheme, plan, or motive, and therefore satisfy the relatedness requirement.

USX made payments to the Fairfield Six over a period of three and one-half years (from December 1984 to May 1988). This case is therefore unlike *Aldridge v. Lily-Tulip, Inc.,* 953 F.2d 587 (11th Cir. 1992), in which we held that a fraud requiring the use of the mails for six months "was accomplished in too short a period of time . . . to qualify as a pattern of racketeering activity." *Id.* at 593. Furthermore, as the district court observed, a reasonable jury could find that the defendants carried on racketeering activity during the 1983 negotiations, when the Union negotiators made the illegal request, and throughout 1984, when the pensions were established. That period of time is sufficiently long for a reasonable jury to conclude that the plaintiffs established closed-ended continuity.

b. The Other Requirements of § 1962

USX argues in the alternative that even if the jury could find that the defendants engaged in a pattern of racketeering activity, the award of summary judgment against the plaintiffs should be upheld because there is no genuine issue of material fact that the additional elements required for criminal liability under various subsections of § 1962 exist. We disagree.

[11] Under § 1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by § 1962(c). In *United States v. Hartley*, 678 F.2d 961, 986 (11th Cir. 1982), a panel of this Court held "that a corporation can simultaneously be named as a defendant *and* satisfy the 'enterprise' requirement." (Emphasis added). USX argues that we should reverse that position. That, of course, we cannot do, because "[t]his panel is bound by the decisions of prior panels of the Eleventh Circuit unless overruled by the *en banc* court or the Supreme Court." *Pollgreen v. Morris*, 911 F.2d 527, 534 (11th Cir. 1990). Under *Hartley*, a reasonable jury could conclude that the defendants violated § 1962(c); we therefore need not reach the plaintiffs' counter-arguments that the jury could find violations of § 1962(1), (b), or (d), or that the jury could find a violation of § 1962(c), even if *Hartley* is rejected, because the jury could find that the Fairfield Works, or the Union, or District 36 of the Union, or the Fund, was the "enterprise" for RICO purposes.

[12] USX also argues that RICO is unconstitutionally vague. In *United States v. Van Dorn*, 925 F.2d 1331, 1334 n. 2 (11th Cir. 1991), this Court found the argument that RICO is unconstitutionally vague to be "completely lacking in merit."

In summary, the plaintiffs have established the first element of a civil RICO claim by producing evidence from which a reasonable jury could conclude that the defendants violated § 1962(c). Thus, the district court correctly declined to grant summary judgment on the first RICO element. We turn now to causation, the second element of a RICO claim, the ground on which the district court did grant summary judgment for the defendants.

2. Causation

In awarding summary judgment to the defendants on the RICO claim, the district court held that the plaintiffs had failed to show the existence of a genuine issue of material fact as to whether the alleged bribery of the Union negotiators caused injury to the plaintiffs. The court reasoned that the plaintiffs had produced no evidence that the alleged bribes caused any of the concessions in the 1983 Fairfield Works Agreement [FWA], and therefore they could not recover:

> Considering [the] evidence in the light most favorable to the plaintiffs, the jury could find the pension issue was the subject of secret discussions several times during the FWA negotiations and that Rich considered the pensions a condition of settlement, but USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign. There is also some evidence from which the jury could infer that USX "committed" to providing the pensions, and that USX intended to influence Rich and Phillips in some manner.
>
> There is no indication or evidence that the negotiators on either side were swayed by their outstanding request for pensions while they negotiated the terms of the agreement. In light of the undisputed evidence that the FWA never changed after USX promised to consider the pension issue, the jury could not reasonably infer that USX's promise

influenced the negotiators to make concessions in the FWA.

More importantly, in view of the additional undisputed evidence that the concessions resulted from the need to make the Fairfield Works profitable before it was reopened, the jury could not soundly infer that it was more likely that the concessions resulted from the bribery of Union officials than from economic necessity. From the evidence plaintiffs presented, a jury could only speculate about USX's motives in giving pensions to Union officials. There is no evidence from which the jury could conclude USX obtained the FWA concessions as a result of paying Union officials pensions. Plaintiffs' invitation to assume that the concessions must have been the result of bribery is not sufficient where the concessions could just as likely have resulted from the need to make Fairfield economically viable.

The district court's assertion, that there was substantial evidence that the concessions were caused by adverse economic conditions in the steel industry at the time, apparently refers to the deposition testimony of the negotiators: that the pension question had not influenced the Agreement; that the USX negotiators had said USX could not afford to reopen the plant without concessions; and that the Union negotiators did win a less concessionary agreement than the Company had initially been willing to accept.

[13, 14] We begin our analysis by observing that the plaintiffs need not prove that the matter involving the personal pension benefits caused all of the concessions in the Agreement, or that the prevailing economic conditions had no effect on the negotiations. It is well-established that RICO plaintiffs must prove proximate causation in order to recover. *Holmes v. Securities Investor Protection Corp.*, __ U.S. __, __ _ __, 112 S.Ct. 1311,

1317-18, 117 L.Ed.2d 532 (1992); *see also Reverend Father O'Malley v. Reverend Father O'Neill,* 887 F.2d 1557, 1561 (11th Cir. 1989). In other words, "[c]ausation principles generally applicable to tort liability must be considered applicable" in RICO cases. *Brandenburg v. Seidel,* 859 F.2d 1179, 1189 (4th Cir. 1988). A proximate cause is not, however, the same thing as a sole cause. Instead, a factor is a proximate cause if it is "a substantial factor in the sequence of responsible causation." *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 23-24 (2d Cir. 1990). It is beside the point whether the depressed condition of the steel industry also contributed to the concessions. *See* W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1974) ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.")

Moreover, there were many different concessions worth varying amounts in the Agreement. The proximate cause question is whether Rich and Phillips' pursuit of the pensions was responsible for changing the amount of any concessions to which the Union agreed, not whether it was responsible for the Union's having to make any concessions in the first place or most of the concessions in the final analysis. For example, if the Agreement cost the Union membership X million dollars in total concessions, but would have cost only X million minus 100,000 dollars in concessions but for the personal pension matter, then that matter caused the membership 100,000 dollars in injury. The district court appears to have recognized as much, noting that "[p]laintiffs' return to work under less favorable conditions constituted an injury to their business or property sufficient to satisfy RICO requirements, if plaintiffs could show they would have returned to work under a less concessionary agreement absent the RICO violations." We agree with that proposition.

To avoid summary judgment, therefore, the plaintiffs must point to evidence from which a reasonable jury could infer that Rich and Phillips' pursuit of pensions for themselves and their friends caused some part of the total dollar amount of concessions in the Fairfield Works Agreement. The district court concluded that "the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA," because any deal on the pensions came after the Agreement was in final form (although before it was signed). The court seems to have assumed that the plaintiffs must prove that USX's ultimate agreement to provide the pension benefits caused the concessions. However, the mere request for unearned pension benefits constituted a violation of 29 U.S.C.A. § 186(b) and therefore was racketeering activity under 18 U.S.C. § 1961(1)(C). That request, it will be recalled, was first made early in the course of the negotiations. Accordingly, the element of causation is satisfied if the Union negotiators were influenced to make any amount or degree of concessions in the subsequent rounds of negotiations by their desire to convince the Company to agree to their outstanding illegal request coupled with the Company's failure to reject the pension request from the beginning.

[15, 16] Under the federal standard for the sufficiency of evidence, a plaintiff may prove causation by circumstantial evidence. *Porter v. American Optical Corp.*, 641 F.2d 1128, 1142 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). "Inferences from circumstantial facts may frequently amount to 'full proof' of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary." *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977). Here, although there may be no direct evidence that the Union negotiators made concessions to obtain personal pension benefits, there is a great deal of circumstantial evidence that could lead a reasonable jury to that conclusion. We are particularly reluctant to disregard inferences drawn from circumstantial evidence as to

the negotiators' motive. This Circuit is "mindful that 'summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.'" *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985) (quoting *Norfolk Monument Co. v. Woodlawn Memorial Gardens,* 394 U.S. 700, 704, 89 S.Ct. 1391, 1393, 22 L.Ed.2d 658 (1969)), *cert. denied,* 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

In the following paragraphs, we discuss the facts which a reasonable jury could rationally find from the evidence at the time summary judgment was granted, and the evidence from which these facts could be found. Then, we will discuss the cumulative effect of these facts and the conclusion that rationally could be inferred from them. As we said in *Swint v. City of Wadley,* 5 F.3d 1435, 1439 (11th Cir. 1993), "what we state as 'facts' in this opinion for purposes of reviewing the rulings on the summary judgment motion[ ] may not be the actual facts. They are, however, the facts for present purposes, and we set them out below."

Gaining the personal pension benefits was of paramount concern to Rich and Phillips in the Fairfield negotiations, and it was a condition of their agreement to any settlement. Emmett Bruce Thrasher, director of another International Union district, testified at the criminal trial that Rich had told him that achieving the pension benefits would be a prerequisite of the Union negotiators' consent to any agreement in the Fairfield negotiations. USX's Vice President for Labor Relations, William Miller, took notes at an October 27, 1983, meeting during the negotiations which also refer to Rich's demand for pension benefits as "a condition of settlement" of any agreement at Fairfield.

Rich and Phillips brought their personal pension demand up more than once, and it was discussed intermittently throughout

the negotiation process. Miller testified that Rich first raised the matter after one of the early negotiating sessions by saying "I want this taken care of" while handing Miller a piece of paper on which the demand for pension credit for Fairfield Union officials was written. On December 22, 1983, two days before the end of the negotiations, Miller met in Pittsburgh with other high-ranking USX officials and listed the pension credits for the Union officials as one of the items still on the table. Miller testified that he reported that, "Mr. Rich and Mr. Phillips had continued to talk abut the matter in the context of . . . other corporations and what they were doing." Furthermore, when Miller asked J. Bruce Johnston, USX Executive Vice President for Employee Relations, for instructions on how to respond to Rich's and Phillips' ultimatum on the pension question, Johnston responded with a very detailed set of conditions under which USX would agree to the pension request. (Johnston testified that he told Miller not to guarantee anything, but the notes Miller took during the conversation contain no such instruction.) It is permissible to infer that Johnston would not have produced such a detailed list of conditions for the pension benefits if the subject of the pension benefits had been mentioned only once months earlier and then dropped; therefore, the benefits had been discusses several times over the course of the negotiations while the concessions were being hammered out.

The subject of personal pensions for Rich and Phillips was always discussed between them and the USX negotiators in secret. Rich first raised the issue by slipping Miller a handwritten note after a negotiating session. Phillips testified that thereafter, when the USX negotiators discussed the subject, they never did so in the hotel conference room where the formal negotiations were held, but only in a small room across the hall or in the hallway or lobby.

After the concessions were negotiated, Rich and Phillips refused to sign the Agreement until they received assurances that

their pension requests would be considered favorably. Miller testified in deposition that Rich and Phillips refused to sign the Fairfield Agreement until they had received an answer to their request for pension credit, and that as far as USX was concerned, "their signatures were essential." Only after he told them that he thought their pension request "would be considered favorably" did they sign, Miller testified.

The words and actions of USX officials indicate that the Company itself believed that it had made a commitment to provide the pension benefits as part of the Fairfield Works Agreement. Johnston's signature appears on the recommendation for pensions for the Fairfield Six, which states that the "pensions . . . are recommended *in accord with the December 24, 1983 agreement* between the Company and the USW at Fairfield Works." (Emphasis added). According to the original proposal, the pensions were to start on September 1, 1984. A September 25, 1984, letter to Johnston from J.D. Short, USX's Vice President for Employee Benefits, refers to a change in the starting date to February 29, 1984, "as I understand the *commitment* was made that" the pensions would be effective as of March 1. The pension requests submitted by each of the Fairfield Six bear the notation "Per 12-24-83 Agreement." Furthermore, when other Union officials applied for similar pensions, Johnston wrote Union president Lynn Williams that the policy was being cancelled — but that the Fairfield Six would continue to receive their payments. That action and the documents quoted above indicate that USX's supposedly unilateral change in policy was actually the result of a commitment to provide pensions to the Fairfield Six, a commitment given in exchange for concessions from Rich and Phillips.

The defendants tried to keep the existence of the Fairfield Six's pensions secret. In 1986, two years after he had begun receiving his pension, Rich told two other Union representatives that the pension matter had not been resolved in the Fairfield

negotiations, so that they need not apply for pensions. There is evidence that Phillips emphatically denied that pension credits were even discussed at the Fairfield negotiations. Although Union president Williams received a letter from USX in 1985 stating that USX had changed its leave-of-absence policy to allow Union representatives longer leaves of absence "at the discretion of the Company on a case-by-case basis," the Union never approached the Company about granting more such leaves of absence and seems not to have informed any of its representatives of the opportunity. Furthermore, in its answer to a lawsuit filed by Emmett Bruce Thrasher, also a Union representative, the Union denied the allegation that Rich, Phillips, and others had received pensions as part of the Agreement. In another lawsuit brought by William Sommerville, also a Union representative, Union attorney Bernard Kleiman swore in an affidavit that Rich, Phillips, and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pension purposes, they had retired.

USX, like the Union, told no other Union representative about the change in its pension policy, although a number of other Union representatives would appear to have qualified for it. During the negotiations, Miller asked Schick, USX's General Manager of Labor Relations, to prepare information on the Fairfield Six and to keep the matter confidential. Ed Owens, a USX official at the Fairfield plant, was asked to prepare pension documents for the Fairfield Six and not to "publicize" it; according to USX, those documents have now disappeared.

A jury could find it strange that those who insist that their conduct was proper and their intent pure went to such great lengths to hide it all from the light of day. From such secrecy much may be inferred.

Giving the Fairfield Six the pensions Rich and Phillips demanded during contract negotiations cost the Company a sub-

stantial sum of money, and the Company would not have agreed to that private concession without a concession from the Union side in return. Johnston, testifying about a request that International Union president Lynn Williams made during the same period that USX extend pension benefits for workers at another plant, said that he told Jim Short: "I'm sure not going to voluntarily give away millions of dollars that we might not have to give away in a year in which we are losing money at an awesome rate." He also recalled that "all during '83 and '84 we had a very correct and very tough and very hardnosed arm's length relationship with the Steelworkers." It strains credulity to suggest that a company committed to the profit motive, in a period in which it was in dire financial straits, would in a "very hardnosed arm's length relationship" give away, for nothing in return, unearned pension benefits that cost USX hundreds of thousands of dollars.[2]

Instead of receiving personal pension benefits for themselves and their friends, Rich and Phillips could have demanded and obtained from USX a reduction in the Union's concessions of an amount equal to the cost of the pensions. That conclusion follows as a matter of economics from the nature of the collective bargaining process. There is no reason why a company that would agree to give up a dollar in unlawful pension benefits to union officials would not instead agree to accept one dollar less in concessions from the Union. Indeed, assuming that freedom from the risk of detection and prosecution is worth something to

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[2] At oral argument, counsel for the Union conceded that the pensions "may well" have been worth hundreds of thousands of dollars. USX's records reveal that the pensions received by the Fairfield Six paid from $888.67 per month to $1,183.25 per month. According to the plaintiffs, the present value of such a pension for Emmett Bruce Thrasher, a Union official who was not included in the Fairfield Six, would have been $88,574.00 in 1987. Whatever their precise value, it is clear that the pensions were worth a substantial amount of money.

corporations and their officials, it is reasonable to infer that the Company would have been willing to forego more than one dollar in concessions for every dollar it could have avoided paying out in illegal benefits.

In summary, negotiating their personal pensions was of paramount concern to Rich and Phillips, and they considered it to be a condition of settlement. The issue was discussed intermittently throughout the negotiations about concessions, and always in secret. Rich and Phillips refused to sign the negotiated agreement until they received assurances that their pension requests would be considered favorably. The Company and its officials believed that it was committed to pay the pension benefits as part of the Fairfield Works Agreement. All of the defendants tried very hard to keep the pensions secret. The pensions cost the Company a substantial sum of money, and it would not have agreed to them without receiving something in return. Finally, instead of using their position as Union negotiators to gain the pensions for themselves and their friends, Rich and Phillips could have secured a reduction in concessions equal to or greater in value than the pensions. From all of those facts, a reasonable jury could conclude that the pursuit of personal pension benefits by Rich and Phillips, coupled with the Company's failure to reject the idea from the beginning, caused the Agreement to contain more concessions from the Union than it would have contained if Rich and Phillips had been completely loyal to the rank-and-file Union membership.

The district court observed that "USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign." Because the Agreement's text did not change after USX promised that the request "would be considered favorably," the court concluded that the plaintiffs could not show that the Union negotiators made any concessions to secure their pensions. The district court erred by placing too much reliance upon the timing

of the Company's formal promise of the illegitimate pensions. As we have explained above, there was ample evidence that, even without a formal agreement, the combination of illicit behavior by Rich, Phillips, and the Company caused the amount of the concessions actually negotiated to be more than they would otherwise have been.

Moreover, the district court placed too little weight on the value of the signatures of Rich and Phillips to the negotiated Collective Bargaining Agreement. Even though the agreement had already been negotiated and the concessions agreed upon, Rich and Phillips had something that the Company needed and was willing to trade for — their signatures as the Union's negotiators. USX was willing to trade a promise to grant the pension benefits (saying the requests "would be considered favorably") in exchange for those signatures, and that trade was made. Instead of trading their signatures for personal pension benefits, which the Union concedes "may well" have been worth hundreds of thousands of dollars, Rich and Phillips could have traded their signatures for the benefit of all of the workers whom they represented — refusing to sign until the Company agreed to reduce the amount of concessions granted by the same hundreds of thousands of dollars. Thus, even focusing exclusively upon the conclusion of the collective bargaining process, a rational jury could infer that, as a result of their demand for personal pension benefits, the Agreement was more concessionary than it would have been otherwise. The district court should not have granted summary judgment for the defendants on the causation issue.[3]

[3] USX and the Union argue that the grant of summary judgment can be affirmed on the alternative ground that the plaintiffs failed to produce evidence from which the jury could conclude that they were actually injured (as opposed to evidence from which the jury could conclude that the injury was caused by the pension request). However, because a rational jury could infer that the Agreement was more concessionary than it otherwise would have been, the jury could find injury.

3. Union Liability Under RICO

The Union argues in the alternative that the district court's grant of summary judgment for the Union should be affirmed because the Union is not liable under RICO for the acts of its representatives. The Union argues that because it is the victim of the racketeering activity of its negotiators, it should not be held liable for their violations.

The plaintiffs argue that the Union can be liable under RICO, not only under the principle of *respondeat superior,* but also because "the Union not only learned of its employees' illegal acts and failed to take action, but also willfully participated, conspired, aided and abetted, ratified and actively concealed the illegal acts of Rich and Phillips," while under a fiduciary duty to act in the best interest of its members. They contend that the Union is not a victim; the victims, they maintain, are the "rank-and-file" workers.

We will address in turn the theories that the parties have put forward.

a. Liability of "Victim" Enterprise Under RICO

According to the Union, "Congress did not intend RICO liability to attach to legitimate enterprises that are used as passive instruments for the racketeering activities of employees or others," but instead intended to protect those enterprises. The Union argues that, in response to Congress' intention, "the cases . . . hold that where an individual violates RICO by using an enterprise as the instrumentality of his racketeering activities, liability attaches to the wrongdoing individual, not to the enterprise."

The district court determined that there was no support in the record for the Union's claim that it was a victim. The only injury alleged was the injury to the Union member plaintiffs; the Union produced no evidence that the Union itself had been victimized.

The court therefore held that the Union had failed to demonstrate the absence of a genuine issue of material fact, and refused to grant summary judgment on the basis that the Union was a victim of racketeering activity and therefore could not be held liable for that activity.

[17] However, we need not address the question of whether the Union presented adequate evidence of its victimization, because we reject the Union's argument that "[t]he law in this Circuit is fully consistent with" the cases refusing to hold RICO enterprises liable for the violations of their subordinates. Our review of the cases cited by the Union reveals that although some courts have recognized a narrow exception to vicarious liability under RICO, that exception has been created in order to preserve the non-identity rule (that under § 1962(c), the RICO defendant and the RICO enterprise cannot be one and the same). As discussed in subpart B.1.b, above, this Circuit has unequivocally rejected that rule.

The cases that the Union cites for the proposition that an enterprise is not liable under RICO for the acts of its employees which abuse the enterprise all trace their roots to *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). In *Haroco*, the Seventh Circuit held that the American National Bank could not be liable under 18 U.S.C. § 1962(c), because that subsection "requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity." *Id.* at 400. The *Haroco* court reasoned that the "non-identity" requirement of §1962(c) would not allow corrupt corporations to escape all RICO liability, because § 1962(a) contains no such requirement; under that subsection, "the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations." *Id.* at 402. As a result, the "corporation-enterprise" is "liable under RICO when the corporation is actually the direct or indirect beneficiary

of the pattern of racketeering activity, but not when it is merely the victim, price, or passive instrument of racketeering." *Id.*

In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir.1987), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989), "to avoid holding vicariously liable a corporation that was the victim of a RICO violation," the Seventh Circuit held that a corporation will be held vicariously liable for the RICO violations of its employees "only when 1) the corporation has derived some benefit from the RICO violation and 2) imposing vicarious liability is not inconsistent with the intent of Congress." *Id.* (emphasis omitted). Following the reasoning laid out in *Haroco*, the court held that "[v]icarious liability . . . has only limited application to civil RICO." *Id.* The Seventh Circuit has voiced concern "that *respondeat superior* might be used to circumvent § 1962(c)'s requirement that the person conducting the racketeering activities be separate from the enterprise through which those activities are conducted." *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir.1989). Nonetheless, the Seventh Circuit has approved vicarious liability when holding the employer liable would not violate the non-identity rule: "*Respondeat superior* is . . . entirely appropriate under both subsections (a) and (b)" of § 1962, because those subsections contain no non-identity requirement. *Liquid Air Corp.*, 834 F.2d at 1307. Similarly, *respondeat superior* will make liable under § 1962(c) a corporation whose officers conspire to conduct the affairs of *another* corporation through a pattern of racketeering, because the second corporation then serves as the RICO "enterprise." *Ashland Oil*, 875 F.2d at 1281.

Despite the inclusion of some broad language, the cases cited by the Union stand only for the proposition that, in order to preserve the non-identity rule, vicarious liability should not be imposed under § 1962(c) where the employer is also the RICO enterprise. Thus, although the First Circuit in *Schofield v. First Commodity Corp.* 793 F.2d 28 (1st Cir.1986), stated broadly that

"the concept of vicarious liability is directly at odds with the Congressional intent behind section 1962(c)," *id.* at 32, the actual holding of that case was merely that "section 1962(c) does not extend liability to the *enterprise*," *id* at 30 (emphasis added). That was reemphasized in a recent First Circuit opinion which viewed *Schofield* as holding merely that "[s]ection 1962(c) does not recognize corporate liability on the *enterprise's* part under a theory of *respondeat superior.*" *Miranda v. Ponce' Federal Bank*, 948 F.2d 41, 45 (1st Cir.1991) (emphasis added). Similarly, the Eighth Circuit declined to apply *respondeat superior* to a corporate defendant for the actions of its chief financial officer, quoting *Schofield*: "Both the language of [§ 1962(c)] and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal 'person' or 'persons.'" *Luthi v. Tonka Corp.* 815 F.2d 1229, 1230 (8th Cir.1987).

The D.C. Circuit, in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir.1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C.Cir.1990) *(en banc), cert. denied*, __ U.S. __, 111 S.Ct. 2839, 115 L. Ed.2d 1007 (1991), adopted *Haroco's* view of subsections (a) and (c) of § 1962:

> Through section (a), Congress provided for punishment of organizations which in fact gain from their wrongdoing by focusing on profits gleaned from illegal activities, thus "sparing" organizations that do not so profit. Section (c) likewise immunizes organizations which are merely "victims," but this result depends on the requirement of non-identity of person and enterprise which also places some corrupt organizations beyond reach.

Because of its adoption of the *Schofield* court's non-identity rule analysis, the *Yellow Bus Lines* court sided "with those courts that forbid identity of person and enterprise under § 1962(c)." *Id.*

The Third Circuit, in *Petro-Tech, Inc. v. Western Co.*, 824 F.2d 1349 (3d Cir.1987), reviewed a complaint in which Petro-Tech sought to recover from Western on six counts under civil RICO; Western has named as the RICO enterprise in only some of the counts. The Third Circuit held that imposing "respondeat superior and aiding and abetting liability" on a corporate defendant names as the RICO enterprise under § 1962(c) "would disrupt the intended operation of § 1962(c), by making the § 1962(c) enterprise . . . liable." *Id.* at 1359. However, in regard to those counts in which Western was not the § 1962(c) enterprise, "theories of respondeat superior and aiding and abetting liability are not out of place," because the non-identity rule was not involved. *Id.* at 1361-62. The Third Circuit has also held that injunctive relief may be granted against an employer found to be a RICO enterprise, even if damages may not. *United States v. Local 30, United Slate*, 871 F.2d 401, 405 (3d Cir.1989).

The Ninth Circuit recently noted that there is "general agreement that respondeat superior liability is inappropriate under 18 U.S.C. § 1962(c) when the enterprise and person are not distinct." *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1154 (9th Cir.1992). However, reasoning that "[r]espondeat superior and agency liability will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities," *id.* at 1155, the *Brady* court held that "an employer that is benefitted by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise," *id.* at 1154.

The Sixth Circuit was recently faced with the question whether "ordinary principles of *respondeat superior*" applied to the Mutual Life Insurance Company (MONY), a group of whose employees violated § 1962(c) by selling fraudulent life insurance policies. *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 380 (6th Cir.1993). The *Davis* court rejected the argument that "as a

matter of law, a corporate principal may not be vicariously liable for its agents' actions in violation of section 1962(c)." *Id.* at 378. Finding that the cases declining to apply vicarious liability were "intertwined with the widely-embraced principle that a corporation may not be named as both a defendant 'party' and as the RICO 'enterprise,'" *id.* at 379. Instead, *Davis* held that:

> The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctiveness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents, particularly where the corporation benefited by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

Id. Because the RICO enterprise involved in *Davis* was the association of MONY employees who were engaged in the fraud, the non-identity rule was not threatened, and the court upheld the jury's finding that MONY was liable for the acts of its agents. *See id.* at 377-78.

Our review of the law of other circuits thus reveals that the RICO exception to the application of vicarious liability is a narrow one, created to preserve the non-identity rule, and it therefore protects only those employers who are also the RICO enterprise for purposes of § 1962(c). We, of course, have squarely rejected the non-identity rule, observing that liability for the acts of one's agents "is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the appendant responsibilities." *United States v. Hartley*, 678 F.2d 961, 989 n. 43 (11th Cir.1982). The narrow exception

to vicarious liability recognized by some circuits in order to preserve the non-identity rule is, therefore, inapplicable.

Even if we had adopted the non-identity rule, however, the Union still would not be exempt from liability in this case. Although the plaintiffs have alleged that the Union is a RICO enterprise for purposes of § 1962(c), they also allege that the Fairfield Works and the Fund are enterprises as well. The non-identity rule would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund.

b. *Respondeat Superior* Liability Under RICO

[18] The plaintiffs argue that the Union can be held liable under general agency principles and the *respondeat superior* doctrine. The district court ruled against the plaintiffs on this issue, reasoning that the Union was not liable under agency principles because "the plaintiffs do not claim the Union negotiators, acting with apparent authority, made misrepresentations to them upon which they relied." The plaintiffs argue, correctly, that there is no requirement of reliance for a principal to be liable under RICO for the acts of its agent.

Since the district court entered its order, this Court spelled out the elements of *respondeat superior* liability for RICO violations in *Quick v. People's Bank of Cullman County*, 993 F.2d 793 (11th Cir.1993). Although we have rejected the "non-identity" rule, we have expressed concern that enterprises that are merely victims of the RICO violations perpetrated by their employees should not be held liable for the acts of their employees under *respondeat superior*. In *Quick*, 993 F.2d at 797-98, we held that *respondeat superior* liability may be applied under § 1962(b) only to those enterprises that derive some benefit from the RICO violation. The *Quick* court also outlined the "general agency principles" to be applied in determining whether a *prima facie* case of vicarious liability under RICO has been made out:

> Under general agency rules, a corporation (principal) will be vicariously responsible for the wrongful acts of its employees (agents) when the acts are: (1) related to and committed within the course of employment; (2) committed in furtherance [of the business] of the corporation; and (3) authorized or subsequently acquiesced in by the corporation.

Id. at 797 (quoting *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir.1987) (bracketed material in original), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989)). In *Quick*, we upheld the application of *respondeat superior* to hold a bank liable for the actions of one of its loan officers who, among other misdeeds, demanded deposits and loan payments from borrowers in cash and failed to credit them to the proper accounts. *Id.* at 795. Because the officer's "activities were incident to his assigned duties and took place at the Bank during business hours," we determined that the first element of vicarious liability was satisfied. *Id.* at 797. Because the officer's activities were related to his function of making loans, we determined that the second element was satisfied as well. *Id.* at 797-98. As to the third element, we determined that there was sufficient evidence the bank had acquiesced in the officer's activities because it, among other things, attempted to cover up the misconduct. *Id.* at 798.

[19] In the present case, because the demand for personal pension benefits that Rich and Phillips made was incident to their duties as Union representatives in the Fairfield Works negotiations, a reasonable jury could conclude that their actions were committed in the course of their employment, so the first *Quick* element is satisfied. Furthermore, because the demand was related to their function of negotiating on behalf of the Union, a reasonable jury could conclude that the second element, that the action be committed in the furtherance of the business of the principal, is also satisfied. Finally, the Union's failure to

investigate the allegations against Rich and Phillips or to discipline them until after their convictions, coupled with its attempt to cover up their wrongdoing, could lead a reasonable jury to find that the Union acquiesced in their misdeeds.

A union's failure to act may constitute acquiescence. In *Prater v. United Mine Workers of America*, 793 F.2d 1201 (11th Cir.1986), in which a union had been notified of the violent acts of some of its members, we held that "[b]y failing to take any action to stop the violence, union officials acquiesce[d] in or ratified the illegal activities of the union miners." *Id.* at 1210. Similarly, in *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir.1970), *cert. denied*, 401 U.S. 963, 91 S.Ct. 974, 28 L.Ed.2d 247 (1971), in which union members illegally encouraged employees of Vulcan not to report to work, we held that although a union official "may have advised Vulcan employees to return to work, he never took action which could reasonabl[y] have been expected to effectuate this end and thus can be said to have, at the very least, acquiesced in and condoned the illegal activity." *Id.* at 457. In *Local 1814, Int'l. Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384 (D.C.Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984), two union officials had been convicted of violating the same anti-bribery statute that Rich and Phillips have been convicted of violating. The D.C. Circuit held that "the Union's retention of [the officials] in their high controlling offices, long after the grand jury indictments had put Local 1814 on notice of their misdeeds, is tantamount to acquiescence or condonation of their unlawful acts." *Id.* at 1396. The Court noted that, "[u]nder such circumstances, one might reasonably have expected a truly upright union to have taken *some* disciplinary action." *Id.*

In the present case, there is no evidence the Union took any disciplinary action against Rich and Phillips, or even made any effort to investigate their actions, until after their criminal

convictions. A jury could find that the Union was put on notice of the misdeeds of its negotiators: by Johnston's 1985 letter to Williams, the Union's president, informing him of the decision to change USX policy and to grant leaves of absence to six Union officials; by Johnston's 1987 letter to Williams informing him that the policy was being dropped, but that the six previously granted pension would continue to receive payments; by the allegations in the *Thrasher and Sommerville* suits; and by the indictment in the criminal case. A jury could therefore determine that the Union's failure to take any action against two of its negotiators, after being put on notice of their violation of the anti-bribery statute, constitutes acquiescence in their actions.

A reasonable jury could therefore find that the plaintiffs have made out a *prima facie* case of *respondeat superior* liability on the Union's part. The remaining question under *Quick* is whether the Union derived some benefit from the negotiators' RICO violation. In arguing that Rich and Phillips' solicitation of unearned pension credits did benefit the Union, the plaintiffs point to deposition testimony by Union president Lynn Williams, who stated that:

> I believe that every employee of the Union . . . that come[s] from the shops where our members work, ought to be entitled to an indefinite leave of absence so long as they serve the Union, ought to be entitled at whatever time in the future history, so long as they haven't left the Union, to go back to their original place of employment, and I disagree very much with the restrictions . . . which USX has put on that all of these years in the Agreement. . . .
>
> So, I think that anybody, any representative that can push the leave of absence question past that and enable us to get wedges out there will enable us to move that whole leave of absence question forward, I would think in that instance, that is a good thing. . . .

The Union argues that it did not benefit from Rich and Phillips' solicitation of pension credits for the Fairfield Six, because no pension payment was made to the Union. It dismisses the plaintiffs reliance on Williams' comments, contending that Williams was merely discussing recall rights, not pension credits, and that he did not imply that the Union would benefit by trading contract concessions for those rights. Payment to Union officers, the Union argues, "does not establish a benefit to the Union, any more than a bank could be said to benefit from a bribe of a group of its employees."

[20] The Union's argument that it would have benefitted had USX granted recall rights to the negotiators, but did not benefit from the pension rights that were granted, is a distinction without a difference. The question is not whether the Union benefitted in some overall calculation, weighing the concessions made against the value of the pensions received. The question is whether the Union "derived *some* benefit from the RICO violation." *Quick*, 993 F.2d at 797 (emphasis added). Williams' testimony establishes that the Union benefits when one of its representatives is granted a leave of absence to work for the Union. Whether that leave confers recall rights on the employee, or pension benefits, or both, the point is that such benefits make Union representation more attractive, so that the Union has an easier time recruiting workers to serve as representatives. A jury could therefore find that the Union benefitted from the pension benefits given to its negotiators. We therefore must reject the Union's argument that the award of summary judgment can be upheld on the grounds that the Union cannot be liable for the RICO violations of its negotiators.

c. RICO Liability for Violation of Fiduciary Duty

The plaintiffs further argue that the Union is liable for the acts of its representatives because it has a fiduciary duty to the rank and file to monitor the conduct of its representatives and to remedy their illegal actions. The district court rejected that

argument, reasoning that even if the Union were liable for failing to take action against Rich and Phillips, that would not make the Union liable for the negotiators' racketeering activity: "[a] breach of fiduciary duty is not, in itself, racketeering activity constituting a predicate act under RICO."

[21] It is true that the duty of fair representation that the Union owes to its members "applies to all union activity, including contract negotiation" and is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 74, 111 S.Ct. 1127, 1130, 1134, 113 L.Ed.2d 51 (1991). The Union may therefore be liable for approving of, acquiescing in, or concealing a breach of trust committed by one of its employees (although we do not reach that question here). *See Restatement (Second) of Trusts*, § 224(2)(c). As we discuss below, the existence of the fiduciary duty may also be relevant to determining the Union's liability for aiding and abetting the RICO violations of its negotiators. However, as the district court properly held, violating a fiduciary duty is not racketeering activity under 18 U.S.C. § 1961(1), and cannot lead to RICO liability on the Union's part. The district court correctly rejected the plaintiff's fiduciary duty theory of liability.

d. Liability for Ratification of Agent's RICO Violations

The plaintiffs argue that the Union is liable for Rich's and Phillips' RICO violations because its failure to investigate or discipline the two and its efforts to conceal the pensions they received constitute ratification of their actions. The Union contends that it cannot be liable for the acts of its negotiators because it did not ratify their acts with "full knowledge" of the bribery scheme. The district court appears to have agreed with the Union's position. The court reasoned that the letters from Johnston, and the allegations in the *Thrasher* and *Sommerville*

cases, were insufficient to give the Union knowledge that its negotiators had broken the law. Distinguishing between allegations and violations, the district court said "[t]he Union's knowledge of . . . allegations of section 186 violations by Union negotiators is not the same as knowledge of section 186 violations by Union negotiators." Without evidence that the Union knew the truth of the allegations, the district court reasoned that the plaintiffs could not support their claim that the Union ratified Rich and Phillips' actions.

[22] "A principal can ratify the unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." *McDonald v. Hamilton Electric, Inc.*, 666 F.2d 509, 514 (11th Cir.), *cert. denied*, 459 U.S. 879, 103 S.Ct. 175, 74 L.Ed.2d 144 (1982). The district court's reasoning would seem to require the plaintiffs to produce direct evidence that the Union leadership was aware that Rich and Phillips had in fact engaged in prohibited conduct. However, "proof of authorization or ratification can be based upon circumstantial evidence." *James R. Snyder Co. v. Edward Rose & Sons, Inc.*, 546 F.2d 206, 209 (6th Cir.1976). A reasonable jury could infer that the Union's failure to act, after having been placed on notice of the negotiators' betrayal by the allegations, constituted ratification of their misconduct.

In *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C.Cir.1989), *rev'd in part on other grounds*, 913. F.2d 948 (D.C.Cir.1990) (*en banc*), *cert. denied*, __ U.S. __, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991), a Union president received a letter from the president of a bus company which contained allegations that Union members had committed violent acts; there was no evidence "to indicate that the union took action to investigate the allegations or to curb any excesses" of the strikers. The D.C. Circuit held that from the Union's "apparent lack of concern with the violence brought to its attention, the jury

plausibly could conclude that the [Union] 'knowingly tolerated' this state of affairs. No more is required to support a finding of ratification." *Id.*

The situation in this case is similar to that in *Yellow Bus Lines*, and we find the reasoning of that case to be persuasive. Union president Williams testified that he thought it would be "a good thing" for Union representatives to "push the leave of absence question forward;" Williams received a letter from Johnston informing him of the change in USX policy and that six Union representatives had been given pensions; the *Thrasher* and *Sommerville* suits were filed, alleging that Rich and Phillips had received pensions out of the Fairfield negotiations, and Rich and Phillips were indicted for receiving the bribes. In spite of all that, the Union took no action. From the Union's failure to act, a reasonable jury could conclude that the Union "knowingly tolerated" the situation, and thereby ratified it. The same failure to take action that constitutes acquiescence for purposes of *respondeat superior* liability (as we concluded above in subpart II.B.3.b) is also sufficient to constitute ratification. *Prater v. United Mine Workers of America*, 793 F.2d 1201, 1210 (11th Cir.1986).

e. Aiding and Abetting Liability Under RICO

The plaintiffs argue that the Union is liable under RICO for aiding and abetting the RICO violations that Rich and Phillips committed, either because it failed to take any action against them or because it affirmatively covered up their misdeeds. The district court held that the Union could not be liable for aiding and abetting the actions of its representatives by virtue of "'mere negative acquiescence,'" but instead, "there must be evidence that the Union committed an overt act designed to aide in the success of the venture." The court considered the actions taken by the Union in the *Thrasher* and *Sommerville* suits: denying the allegation that Rich, Phillips and others received pensions as a

result of the Fairfield Works Agreement; and filing an affidavit by Union attorney Bernard Kleiman, denying that Rich and Phillips were retired from USX, when in fact they had retired and were receiving pensions. It held that these actions could constitute concealment subjecting the Union to liability if the responsible Union officials knew the truth about the pensions. Accordingly, the district court denied the Union's motion for summary judgment on the aiding and abetting claim, although the denial appears to be without prejudice to a renewal of the motion at the close of discovery.

[23,24] One who aids and abets two predicate acts can be civilly liable under RICO. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356 (3d Cir.1987). To establish civil liability for aiding and abetting, the plaintiffs must show: (1) that the defendant was generally aware of the defendant's role as part of an overall improper activity at the time that he provides the assistance; and (2) that the defendant knowingly and substantially assisted the principal violation. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir.1988), *cert. denied*, 490 U.S. 1091, 109 S.Ct. 2433, 104 L.Ed.2d 989 (1989); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir.1975); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C.Cir.1983). The defendant's "[k]nowledge may be shown by circumstantial evidence, or by reckless conduct." *Woodward*, 522 F.2d at 96. The same evidence that would support a jury's finding that the Union "knowingly tolerated" Rich and Phillips' actions pursuant to the plaintiffs' ratification theory (the letter from Johnston, the allegations in the *Thrasher* and *Sommerville* suits, and the criminal indictment) will also support a jury's finding that the Union was aware of its general role in the scheme.

As we have already concluded in our discussion of causation in subpart II.B.2, above, the jury could infer that the Union took steps to conceal the unearned pensions that USX awarded to the

Union's negotiators. Whether those steps constitute substantial assistance is a question for the jury. The district court was therefore correct in denying the Union's motion for summary judgment on the plaintiffs' aiding and abetting claim.

f. Co-Conspirator's Liability Under RICO

[25] The plaintiffs' final argument for Union liability is that the Union violated 18 U.S.C. § 1962(d), which makes it a crime "for any person to conspire to violate any of the" other RICO provisions. (As we discussed in part II.B, above, anyone "injured in his business or property by reason of a violation of § 1962" may recover treble damages.) To be adjudged liable, "each defendant in a RICO conspiracy case must have joined knowingly in the scheme and been involved himself, directly or indirectly, in the commission of at least two predicate offenses." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 41 (1st Cir. 1991). Proof of an agreement is "the essence of conspiracy." *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980). "Thus, a defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act." *Id.* (citations omitted). However, "[t]he existence of the conspiracy agreement does not have to be proven by direct evidence. Instead, it can be inferred from " 'the conduct of the alleged participants or from circumstantial evidence of the scheme.' " *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir. 1991) (quoting *United States v. Ard*, 731 F.2d 718, 724 (11th Cir. 1984)), *cert. denied*, __ U.S. __, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992). As the district court properly noted, evidence that a defendant assisted in the concealment of a conspiracy may support an inference that the defendant joined in it while it was still in operation. *United States v. Gold*, 743 F.2d 800, 825 (11th Cir. 1984) (quoting *United States v. Freeman*, 498 F.2d 569, 576 (2d Cir. 1974)), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985).

[26] The district court reasoned that, if the plaintiffs were able to show that the Union concealed the racketeering activity of its representatives, a "jury could reasonably infer that the Union joined in while the conspiracy was still in operation," and the Union would therefore be liable. We agree. Because a jury could infer that the Union took steps to conceal Rich's and Phillips' RICO violations, a jury should decide whether the Union is liable for conspiring with them.

g. Summary of Holdings on Union Liability

We agree with the district court that the Union cannot be liable for its representatives' RICO violations under the theory that it violated a fiduciary duty to its members. However, the plaintiffs are entitled to go to trial on their claims that the Union is liable for Rich's and Phillips' RICO violations under *respondeat superior*, ratification, aiding and abetting, and conspiracy theories. We therefore reject the Union's argument that the award of summary judgment must be upheld because it cannot be liable under RICO.

C. THE § 301 CLAIM AGAINST USX

The plaintiffs contend that the district court erred in entering summary judgment against them on their "hybrid" claim against USX for breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. As the Supreme Court explained in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983),

> an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. . . . [H]owever, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/

> arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation. . . . The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

(internal citations and quotation omitted.) The plaintiffs argue that,

> [b]ecause the [Fairfield Works] Agreement is void and unenforceable, USX breached its contractual obligations when USX did not pay members of plaintiff class the full compensation which they should have been paid (from 1984 to date) based on the 1983 Basic Labor Agreement, the 1987 Basic Labor Agreement, and prior practices without regard to the [Fairfield Works] Agreement.

(The Basic Labor Agreement, between USX and the International, governs all of USX's plants in Canada and the United States, in the absence of local agreements.) The district court rejected the claim on the same ground on which it rejected the RICO claim — that "the court can find no evidence of record from which a jury could conclude that the concessions in the FWA were given in exchange for the pension." Having decided that a jury could infer that the Fairfield Works Agreement is more concessionary than it would have been had the Union negotiators not solicited and received unearned pension benefits (in subpart II.B.2, above), we cannot agree with the district court's reasoning or affirm its order granting summary judgment on that basis.

[27] USX argues that we should affirm the grant of summary judgment on the alternative ground — which the district court rejected — that the plaintiffs' § 301 claim was not timely brought. In *DelCostello*, the Supreme Court held that the 6-month statute of limitations from § 10(b) of the National Labor Relations Act should be applied to § 301 suits. 462 U.S. at 169, 103 S.Ct. at 2293. The district court, applying a discovery rule, held that the suit was timely brought, because the defendants were unable to show that the plaintiffs should have uncovered adequate grounds for filing suit prior to six months before the suit was actually filed in December 1988. On appeal, USX argues that our decision in *Hill v. Texaco, Inc.*, 825 F.2d 333 (11th Cir.1987), precludes the application of a discovery rule to actions brought pursuant to a § 10(b) statute of limitations period. In that case, we observed that principles of equitable tolling "cannot be applied in the face of contrary congressional intent." *Id.* at 334. According to USX, because § 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge," it would be contrary to Congressional intent to apply equitable tolling principles to a § 301 suit. However, we have already held that the discovery rule applies to claims under § 301: "Generally, a cause of action accrues under § 301, and the statute of limitations begins to run, *when in the exercise of reasonable diligence the claimant knew or should have known of the injury.*" *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1074-75 (11th Cir.1986) (emphasis added); *see also Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 427 n. 3 (11th Cir.1993). We are, of course, bound by these prior decisions. The district court's refusal to grant summary judgment on the ground of timeliness was therefore entirely correct.

[28] USX also argues that summary judgment is proper on the alternative ground that the plaintiffs' § 301 claim is meritless, because "operations in accordance with consensual modifications" to the Basic Labor Agreement cannot be a breach of

contract. In USX's view, the plaintiffs' claim is one against the Union for breach of the duty of fair representation in signing a bad contract, not against the Company: "where, as here, the duty of fair representation claim is based upon a breach of duty in negotiating a labor agreement, no § 301 employer contract breach is implicated at all." However, the plaintiffs do not allege merely that Rich and Phillips negotiated a bad deal, and we have already concluded that a reasonable jury could infer that USX took advantage of Rich's and Phillips' willingness to pursue personal gain by signing a more concessionary Fairfield Works Agreement than they otherwise would have. And, "[o]f course, a bargain by which a fiduciary takes advantage of his position to profit at the expense of the beneficiary is fraudulent and is voidable by the beneficiary." 6A Arthur Corbin, *Corbin on Contracts*, § 1456, at 534 (1962). Rich and Phillips were fiduciaries of the rank-and-file union membership; the Supreme Court has held that the "duty of fair representation" a Union owes to its members "is . . . akin to the duty owed by other fiduciaries to their beneficiaries." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1191.) The Agreement is therefore voidable.

[29] That does not mean, however, that the plaintiffs are entitled to recover the difference between what they were paid under the Fairfield Works Agreement and what they would have been paid under the Basic Labor Agreement. Upon rescinding a voidable contract, the plaintiffs are entitled "to the reasonable value of a performance rendered" to the Company. 6A Corbin, § 1535, at 822. "Reasonable value" is determined by the marketplace, free of illegitimate taint. It is clear that the rates provided for in the Basic Labor Agreement are not the reasonable market value the plaintiffs would have received for their labors, because it is undisputed that USX had shut down the facility rather than pay those rates. Instead, the proper measure of the value of the work done is the value that the parties would have agreed upon had the Union negotiators not violated their

fiduciary duty. In other words, if a jury finds that the contract was voidable, the plaintiffs are entitled to recover the value of the concessions that the Union negotiators would have extracted from the company if the negotiators had not been pursuing their personal pension benefits.

III. THE ISSUES RELATING TO DISCOVERY

The Union and USX both appeal from orders of the district court rejecting their invocation of the attorney-client privilege during discovery. In the interlocutory appeal and in the appeal of summary judgment on the RICO claim, the plaintiffs complain of limits the district court has placed on their discovery efforts. The areas of discovery affected by the limits may be grouped into four categories: USX pension practices at other plants; grand jury materials; attorney work-product; and limiting the deposition of USX and Union attorneys to written interrogatories.

[30] The Union argues that the plaintiffs failed properly to raise the issues in the district court. According to the Union, the plaintiffs should not be allowed to appeal the limitations on their discovery efforts because the plaintiffs failed to request further discovery into the four areas in either of its Rule 56(f) motions.[4]

[4] When the plaintiffs first raised this issue in the interlocutory appeal, the Union filed a motion, which was carried with the case, to dismiss the plaintiffs' cross-appeal for want of jurisdiction. The Union's argument was that, because the district court denied the plaintiffs' motion for certification of those parts of the order dealing with rulings adverse to the plaintiffs, they should be considered to be different orders for purposes of the interlocutory appeal. The Union's motion was made moot, however, when the plaintiffs raised the same issues in their appeal from the district court's entry of final judgment on the RICO and § 301 claims. "[W]hen reviewing an appeal from a final judgment, this court can review rulings on previous interlocutory orders." *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1438 n.1 (11th Cir.1987) (citing *Aaro, Inc. v. Daewoo Int'l (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir.1985)). The Union's motion to dismiss the cross-appeal is therefore denied.

(The plaintiffs did request further discovery of the attorney-client communications and we discuss those requests below.) However, we cannot agree that the plaintiffs should have included the issues in their Rule 56(f) motions. As the plaintiffs' observe, it would not make sense to require them to request "deferral of the summary judgment motions until plaintiffs could complete discovery which the district court already denied." Having raised the issues below, and having appealed from the entry of final judgment, the plaintiffs are entitled to raise the issues on appeal.

A. STANDARD OF REVIEW

[31] To the extent that the appeals involve mixed questions of law and fact, regarding the applicability of the attorney-client privilege to particular communications that the plaintiffs wish to discover, our review is plenary. *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992); *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1042 (11th Cir.1990). Otherwise, matters of discovery and evidence are committed to the discretion of the district court. *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir.1993); *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1420 (11th Cir.1992). Discovery orders should not be overturned "unless the district court has abused its discretion and such abuse has resulted in substantial harm to the party seeking relief." *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir.1991).

B. THE UNION'S ATTORNEY-CLIENT PRIVILEGE

The district court determined that the Union could not assert the attorney-client privilege against the plaintiffs to prevent them from discovering the content of Union President Williams' discussion with the Union's attorneys regarding USX's change in its leave of absence policy. Although the court rejected the plaintiffs' argument that the crime-fraud exception to the attorney-client privilege applies, it accepted their argument that the

Garner doctrine prevents the Union from invoking the privilege against the plaintiffs, to whom, as members, the Union owes a fiduciary duty.

[32] According to Federal Rule of Evidence 501, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981)), protects the disclosures that a client makes to his attorney, in confidence, for the purpose of securing legal advice or assistance. *In re Grand Jury (G.J. No. 87-03-A)*, 845 F.2d 896, 897 (11th Cir.1988). Based on the theory that "sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client," the privilege is designed "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389, 101 S.Ct. at 682. Despite its value in encouraging clients to confide in their counsel, we have recognized that, as "'an obstacle to the investigation of the truth,'" the privilege is not without exceptions. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir.1970) (quoting 8 Wigmore, *Evidence*, § 2291, at 554), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971).

1. The *Garner* Doctrine

[33] The *Garner* court determined that shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. The *Garner* court observed that "management does not manage for itself and that the beneficiaries of its action are the stockholders." *Id.* at 1101. It is, therefore, "difficult to rationally

defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney's communications with corporate representatives who have only nominal ownership interests, or even none at all." *Id.* However, *Garner* recognized that "the complete removal of the attorney-client privilege from the grasp of the corporation client . . . would expose corporations to harassment suits by minority stockholders and a possible deterioration of candid attorney-client communication and effective corporate management." *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D.Pa.1978). *Garner* therefore does not eliminate the privilege altogether "merely because those demanding information enjoy the status of stockholders." *Garner*, 430 F.2d at 1103. Rather, stockholders are given the opportunity "to show cause why [the privilege] should not be invoked in the particular instance." *Id.* at 1104. The *Garner* panel listed nine factors to be considered in determining whether good cause has been shown:

> [1] the number of shareholders [seeking discovery] and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id.

The plaintiffs argue that the *Garner* doctrine applies to a union's assertion of the attorney-client privilege against its members. *See Nellis v. Air Line Pilots Ass'n*, 144 F.R.D. 68, 71 (E.D.Va.1992) (holding that the *Garner* doctrine applies because unions owe a fiduciary duty to their members under *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991)); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 681 (D.Kan.1986) (holding that the *Garner* doctrine applies to unions because "union officials' association with their members possesses all the essential characteristics of a fiduciary relationship"); *Boswell v. International Blvd. of Elec. Workers Local 164*, 106 L.R.R.M. (BNA) 2713, 1981 WL 27188 (D.N.J.1981) (applying *Garner* to suit brought by union member against union). The Union urges that we adopt the Ninth Circuit's reading of *Garner* in *Weil v. Investment/Indicators Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir.1981), that *"Garner's* holding and policy rationale simply do not apply" outside the context of the shareholder derivative suit. Alternatively, the Union argues that the plaintiffs have failed to show good cause, because they are a small percentage of the Union's membership, seeking damages from the Union for themselves, and have shown no need to know what legal advice Williams received.

The district court determined that the *Garner* doctrine should apply to the Union, because *Garner* was premised "on the view that corporate management owed fiduciary duties to the stockholders of the corporation," and because "the relationship between union and union members" likewise "has fiduciary overtones." The court then determined that the plaintiffs had shown good cause, because "the plaintiff class here is a significant percentage of the total Union membership," and "the plaintiffs' suit advances the general membership's interest in providing a check on the Union's proper discharge of its fiduciary duties to the members." The court also noted that the plaintiffs' claim was colorable, that they had identified the specific communication

that they wished to discover, that no trade secret is involved, and that there is no other source "from which plaintiffs might gain the same information."

Because we hold that even if the *Garner* doctrine applies, it does not support an exception to the attorney-client privilege under the facts of this case, we need not decide whether the *Garner* doctrine does apply to disputes between a union and its members. We do note that the Fifth Circuit has firmly rejected "the Ninth Circuit's narrow interpretation of the types of suits covered by *Garner*." *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir.1988) (citing *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 n. 1 (5th Cir.1982)), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989). However, in applying *Garner* to suits brought by shareholders seeking to recover for themselves at the corporation's expense, the Fifth Circuit:

> recognize[d] reason in the *Weil* holding: Where shareholders bring a successful derivative action on behalf of the corporation, they benefit *all* shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists.

Id. at 786. After applying that "careful scrutiny," the *Ward* court determined that the plaintiffs had failed to show good cause; one of the reasons given was that the "[p]laintiffs cumulatively owned less than four [percent] of the stock in LA Coke." *Id.*

[34] Even assuming the *Garner* doctrine applies to unions, on the facts of this case discovery of the attorney-client communications should not be allowed. Although many of the factors listed in *Garner* appear to support the plaintiffs' argument that

there is good cause for discovery, two factors foreclose it: the fact that only a tiny percentage of the defendant Union's members are members of the plaintiff class; and the fact that the interest of the plaintiff class is adverse to those who are not in the class. *Compare Ward*, 854 F.2d at 786 (fact that plaintiffs owned less than four percent of stock weighs against finding of good cause) *with Fausek v. White*, 965 F.2d 126, 133 (6th Cir.) (fact that plaintiffs own 40% of corporation's stock weighs for finding good cause), *cert. denied*, __ U.S. __, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992). *Garner* recognized that, in a shareholder derivative suit, which the plaintiffs bring on behalf of the corporation, "it is difficult to rationally defend the assertion of the privilege if *all, or substantially all*, stockholders desire to inquire into the attorney's communications with corporate representatives." 430 F.2d at 1101 (emphasis added). This case, however, is unlike the shareholder derivative suit in *Garner*, because the plaintiff class in this case consists of only about one-half of one percent of the international union's membership. The plaintiffs argue that the district court's assertion that the plaintiff class represents "a significant percentage of the total Union membership" can be defended on the ground that the class "represents practically one hundred percent of the USX employees at [the Fairfield] Works who are covered by the [Fairfield] Agreement." The problem with that reasoning is that the lawsuit was not filed against the local union that represents only Fairfield workers; it was filed against the international union. Moreover, the attorney-client communication in question was not to an officer of the local union but to an officer of the international union. Therefore, the proper measure of significance for the plaintiff class is in terms of the national union, whose membership is so large that it dwarfs the size of the plaintiff class.

This case is also unlike the shareholder derivative suit in *Garner*, and is unlike the shareholders' suit against a chief executive officer in *Fausek*, because there is no identity of interests between the plaintiffs and the non-plaintiff Union

members. Instead, their interests are adverse. The plaintiffs in the present case seek damages not on behalf of the Union, but for their personal benefit at the expense of the Union and its other members. Their interests are directly adverse to those of the other Union members. *Garner* noted that "[d]ue regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege." *Id.* at 1101 n. 17. Where such a small fraction of the Union's membership seeks to pierce the attorney-client privilege at the expense of the remaining ninety-nine and one-half percent, "due regard" for the interest of the non-party members requires that the plaintiffs' request be rejected.

2. The Crime-Fraud Exception

[35] The plaintiffs argue in the alternatives that the district court's order compelling Williams's testimony can be upheld under the crime-fraud exception to the attorney-client privilege, because "the Union by its counsel" subsequently made numerous false statements about the pension status of its negotiators, as part of an effort to conceal their illegal actions. The district court rejected this argument because "there is no evidence showing the communication furthered any crime or fraud, or . . . was connected with any crime or fraud."

To determine whether the crime-fraud exception applies, we employ a two-part test laid out in *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir.1987):

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Accord, In re Federal Grand Jury Proceedings, 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir.1991).

While the plaintiffs' evidence of the existence of Union cover-up may satisfy the first prong of the test, we agree with the district court that they have failed to satisfy the second. The purpose of the second prong is to identify "communications that should not be privileged because they were used to further a crime or a fraud." *Schroeder*, 842 F.2d at 1227. Although that determination "must take into account that the [party seeking discovery] does not know precisely what the material will reveal or how useful it will be," *id*, "[t]here is no reason to permit opponents of the privilege to engage in groundless fishing expeditions." *U.S. v. Zolin*, 491 U.S. 554, 571, 109 S.Ct. 2619, 2630, 105 L.Ed.2d 469 (1989).

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
>
> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

Id. at 572, 109 S.Ct. at 2631 (internal citations and quotation omitted). The plaintiffs have failed to produce any evidence that Williams's communications with the Union's attorneys regarding the Johnston letter furthered or were closely related to an effort on the Union's part to conceal the illegal actions of its negotiators. They have therefore failed to show that the district court abused its discretion in refusing to permit even an *in camera* review of the communications involved.

3. Waiver

[36] Finally, the plaintiffs argue that the Union waived the attorney-client privilege by allowing counsel Kleiman to testify in the criminal trial, and by filing Kleiman's affidavits in lawsuits brought by Union representatives who did not receive pensions. At the criminal trial, Kleiman testified about the receipt of the letter from Johnston, and what he did in response; Kleiman did not testify as to the conversation he had with Williams about the letter. The district court reasoned that the Union did not waive the privilege because Kleiman did not disclose any confidential communications.

The attorney-client privilege "belongs solely to the client," and the client may waive it, either expressly or by implication. *In re Von Bulow*, 828 F.2d 94, 100, 101 (2d Cir.1987). We have observed that the doctrine of waiver by implication reflects the position that the attorney-client privilege "'was intended as a shield, not a sword.'" *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir.1987) (applying Florida law) (quoting *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D.Fla.1980)). In other words, "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert.denied* __ U.S.__, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991); *accord United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the privilege.").

The plaintiffs' position appears to be that, having allowed Kleiman to testify about the Johnston letter and the pension status of the Union's negotiators, the Union impliedly waived the privilege as to Williams's communications with Kleiman on the subject. There is support for that position in the version of the implied waiver rule suggested in Wigmore's treatise: "[t]he client's offer of his *own testimony* as to *specific facts* about which

he has happened to communicate with the attorney is not a waiver. . . . But his offer of the *attorney's testimony* as to such specific facts is a waiver," and "a waiver at a *first trial* should suffice as a waiver for a later trial." 8 Wigmore, Evidence § 2298, at 638, 639 (McNaughton rev. 1961) (penultimate emphasis added). Wigmore bases the distinction between the client offering testimony on a subject, and the attorney doing the same, on his view that "the attorney ought in general not to be used as a witness." *Id.* at 637.

However, Wigmore's broad version of the rule goes beyond the considerations of fairness that have motivated the application of the rule; courts generally have not found a waiver where the party attacking the privilege has not been prejudiced:

> The great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information *would be manifestly unfair* to the opposing party.

Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989) (emphasis added) (internal quotation omitted); *see also United States v. Aronoff*, 466 F.Supp. 855, 863 (S.D.N.Y.1979) (finding no waiver where party attacking privilege alleges no prejudice); *Goldman, Sachs & Co. v. Blondis*, 412 F.Supp. 286, 288 (N.D.Ill.1976) (observing that "it is a uniform rule that when a party's conduct reaches a certain point of disclosure, *fairness* requires that the privilege cease" (emphasis added)); *Wender v. United Services Automobile Ass'n*, 434 A.2d 1372, 1374-75 (D.C.1981) (basing waiver analysis on considerations of fairness); *State v. Von Bulow*, 475 A.2d 995, 1007 (R.I.) (citing *Aronoff* and basing implied waiver analysis on considerations of fairness), *cert. denied*, 469 U.S. 875, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984). In *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th

Cir.), *cert. denied*, 459 U.S. 1017, 103, S.Ct. 379, 74 L.Ed.2d 512 (1982), the Eighth Circuit observed that "[c]ourts have found waiver by implication" in three sets of circumstances: "[(1)] when a client testifies concerning portions of the attorney-client communication, [(2)] when a client places the attorney-client relationship directly at issue, and [(3)] when a client asserts reliance on an attorney's advice as an element of a claim or defense." (Internal citations omitted). As a district court in our Circuit has observed:

> "[a]ll of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party."

Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 447 (S.D.Fla.1980) (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1976)).

Because the plaintiffs have failed to explain how they have been prejudiced by any of the actions taken by the Union's lawyers in the criminal case, we decline to find that the Union has impliedly waived its privileges. *See Remington Arms Co. v. Liberty Mutual Ins. Co.*, 142 F.R.D. 408, 415 (D.Del.1992) (holding that the "Court cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant.").

Because the attorney-client privilege is not rendered inapplicable by the *Garner* doctrine or the crime-fraud exception, and because it was not waived, the ruling of the district court granting the plaintiff's motion to compel William's testimony is therefore reversed.

C. USX'S ATTORNEY-CLIENT PRIVILEGE

In the proceedings before the district court, USX has consistently taken the position that "[a]t the time the revised leave-of-absence policy was implemented in October, 1984, . . . USX believed the policy to be lawful." Memorandum of USX Corporation and United States Steel and Carnegie Pension Fund In Support of Their Motion To Dismiss, April 3, 1989, at 5; *see also* Pretrial Order at 5. Although USX has denied any intent to assert a defense of advice of counsel or to rely on any privileged attorney-client communications in its defense, the district court observed that "USX's defense . . . necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change." Reasoning that "it would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law," the district court held that USX waived the attorney-client privilege with regard to such communications.

USX argues that it was the plaintiffs who injected the issue of USX's "state of mind" into the case by including allegations of intentional, criminal wrongdoing in their complaint. Because 29 U.S.C. § 186, the criminal statute that the plaintiffs claim USX violated, contains a component of "willfulness," USX argues that it has merely denied the plaintiffs' allegations, and that a mere denial of *mens rea* should not constitute waiver of the attorney-client privilege.

[37] As we discussed in the previous section, the attorney-client privilege " 'was intended as a shield, not a sword.' " *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir.1987) (quoting *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D.Fla.1980)). USX waives the privilege if it injects into the case an issue that in fairness requires an examination of

otherwise protected communications. *Id.* In *Conkling v. Turner*, 883 F.2d 431, 434-35 (5th Cir. 1989), the plaintiff claimed that the RICO statute of limitations period was tolled because he did not know that a statement made by the defendants was false until told by his attorney 18 years after the fact. The Fifth Circuit held that by doing so, he waived the privilege as to communications from his attorney about the statement; "the attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.'" *Id.* at 434 (quoting *Hearns v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975)) (alteration in original). *See also Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1088 (7th Cir.1987) ("To waive the attorney-client privilege . . . a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case."); *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir.) ("[B]y asserting fraud, [the defendant] . . . waived his right to assert the privilege to prevent disclosure of communications which might have proven he did not rely on [the plaintiffs'] statements."), *cert. denied*, 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982). The defendant need not raise an affirmative defense to inject a new issue into the case, although it frequently occurs that way. *Cf. Lorenz*, 815 F.2d at 1098 (stating that new issues are "[m]ost often" injected "through the use of an affirmative defense").

United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991), although a criminal case, is instructive. Prior to his trial for securities fraud, Bilzerian announced his intention to testify that he believed in good faith that certain disclosures he made to the Securities and Exchange Commission were legal. The district court ruled that if he were to do so, he would waive the attorney-client privilege with respect to those communications with his counsel regarding the legality of his actions. Bilzerian therefore

declined to assert his good faith belief. He was convicted, and he challenged the conviction, arguing that the district court had prevented him from denying criminal intent — an essential element of the crime with which he was charged. The Second Circuit rejected his argument, reasoning that:

> Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

Id. The court held that Bilzerian had not been deprived of the right to deny criminal intent; he "was free to deny criminal intent . . . without asserting good faith." *Id.* at 1293.

[38] Similarly, in the present case, USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege.

The district court ordered the disclosure of those attorney-client communications bearing on USX's knowledge of the law relating to its leave of absence policy, from the date Rich and Phillips first proposed the payments to May 22, 1988 (the date the Company ceased making direct payments to the Fairfield Six). USX argues that because the Company admits it was not certain of the plan's legality after the Third Circuit's 1986 decision in *Trailways Lines, Inc. v. Trailways, Inc.*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932, 107 S.Ct. 403, 93 L.Ed.2d 356 (1986), the waiver should only apply to communications made before that date. We cannot say, however, that the district court abused its discretion in determining that the communications USX had with its attorneys, after *Trailways* and prior to its

decision to cease making direct payments, might bear on what USX knew about the legality of the plan, and when USX knew it. Accordingly, the order of the district court is affirmed.

D. PLAINTIFFS' ATTEMPT TO OBTAIN DISCOVERY OF PENSION PRACTICES AT OTHER PLANTS

1. The Parton Matter

[39] The district court granted the defendants' motion for a protective order preventing the plaintiffs from deposing twelve people to inquire about Jack Parton, a Union negotiator at USX's Gary, Indiana, plant. According to the plaintiffs, Parton was granted a series of one-year leaves of absence beyond USX's two-year limit, so that he too earned pension credit at USX while working for the Union, and thus discovery should be allowed so they can show that his case is part of USX's pattern of RICO violations.

The district court determined that it could "find no relationship and no substantial similarity between the Parton matter and the incidents at the Fairfield Works that are the subject of this lawsuit." We disagree. The plaintiffs have produced evidence showing that the manager of employee relations at the Gary Works promised, in the final hours of negotiations on local issues there, to "take care of" Parton should he be reelected to his position within the Union. Internal USX memoranda reveal that Johnston initially refused to agree to the request: however, on November 18, 1983 (the month before he agreed that Rich and Phillips' request would be considered favorably), Miller granted Parton an extension on his leave of absence. While the district court retains the power to grant a protective order when the information sought in a deposition clearly would be irrelevant, *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979), "relevance is broadly defined in the context of discovery," *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir.1982). The Parton matter is

plainly relevant to plaintiffs' efforts to establish a pattern of RICO violations. The order of the district court is therefore reversed.[5] The district court does retain its authority to keep discovery about the Parton matter within reasonable bounds.

2. Negotiations at Other Plants

[40] The district court also denied the plaintiffs' request that the defendants produce virtually all documents relating to USX business plans for negotiations with the Union at other USX facilities from 1980 to the present. The plaintiffs argue that such an inquiry is necessary so that they can address the defendants' contention that the concessions in the Fairfield agreement were the result of economic necessity rather than the bribes. The district court found that the request was unduly burdensome, particularly given the fact that "[a]greements at other plants present uncontrollable variables resulting from differences in size, location, equipment, productivity, and other unknowable factors, which makes the collective bargaining process unique to each plant. A comparison of the bargaining results between plants is, therefore, the proverbial comparison of apples and oranges." USX characterizes the plaintiffs' request as an overwhelmingly burdensome fishing expedition, and objects on the ground that the documents requested contain business secrets.

"Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied." *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991). By any measure, the plaintiffs have had a significant amount of

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[5] The plaintiffs have filed a motion to supplement the record on appeal to provide this Court with a more complete record on which to evaluate the defendants' arguments. Although we have the "inherent equitable power[]" to supplement the record on appeal, *Jones v. White*, 992 F.2d 1548, 1566 (11th Cir. 1993), the materials offered are not necessary for us to decide this issue, and we therefore decline to exercise that power. The motion is denied.

discovery in this case. The plaintiffs were allowed discovery of those of USX's business plans that were related to the Fairfield Works; they have taken 36 depositions and have received over 50,000 documents from USX alone. Limitations on the scope of discovery are "appropriate when discovery would burden the party from whom it is sought unduly, in comparison with any advantage it would provide to the discovery party . . . because a particular matter is of only minor importance." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure:* § 2040, at 286 (1970). We have already held, in subpart II.B.2 above, that the plaintiffs do not need to show that the prevailing economic conditions had no effect on the negotiations. The substantial burden that the requested discovery would have on the defendants therefore far outweighs any benefits plaintiffs would gain by being able to present a comparison of the results of the Fairfield negotiations to those at other plants. The district court's order denying that discovery was not an abuse of discretion, and it is affirmed.

E. THE GRAND JURY MATERIALS

The district court also denied the plaintiffs' motion to compel production of testimony and documents presented to the grand jury in the criminal case. The plaintiffs argue that because the defendants have in their possession a copy of all of the documents and transcripts of all of the testimony presented to the grand jury, and the defendants' witnesses have been uncooperative, they need access to the materials. The plaintiffs also argue that the defendants' interest in preserving the secrecy of the material is minimal, given that the criminal trial is over.

In the proceedings of November 28, 1990, the district court emphasized that its denial of the plaintiffs' motion "does not preclude [the plaintiffs] from renewing the motion with a specific showing of need. . . . I didn't feel that you made the particularized showing on any of those grand jury proceedings in

order to" compel discovery. It has long been the law of this Circuit

> that disclosure of grand jury testimony is properly granted where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. *Disclosure even in these circumstances must be closely confined to the limited portions of the testimony for which there is found to be a particularized need.*

Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233.242 (5th Cir.1963) (emphasis added). The plaintiffs have made no effort to identify those portions of the grand jury transcripts for which they have a particularized need. Given the opportunity to renew the motion upon a showing of such need, the plaintiffs are unable to demonstrate that the court's order "resulted in substantial harm" warranting a determination that the court abused its discretion. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir.1991). The district court did not abuse its discretion, and its order is affirmed.

F. ATTORNEY WORK PRODUCT

The plaintiffs moved to compel discovery of one document produced by USX attorneys concerning the leave of absence policy, and several documents produced by Union attorneys, relating to statements made by the Fairfield Six or by Emmett Bruce Thrasher that relate to matters in the litigation. They also moved to compel an answer to an interrogatory asking the Union to identify each statement taken by its attorneys during their investigation into requests by Union officials for USX pensions. The district court denied the motions and sanctioned the plaintiffs for bringing them; the plaintiffs appeal that order.

[41] The attorney work-product privilege traces its roots to the recognition by the Supreme Court, in *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947), that

"it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." The privilege is presently codified in Fed.R.Civ.P.26(b)(3), which provides, in part:

> **(3) Trial Preparation: Materials. . . .**
>
> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Material that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, is referred to as "opinion work product." *In re Murphy*, 560 F.2d 326, 336 (8th Cir.1977); *cf. Hickman*, 329 U.S. at 511, 67 S.Ct. at 393; *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S.Ct. 677, 687, 66 L.Ed.2d 584 (1981). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman*, 329 U.S. at 510, 67 S.Ct. at 393. In *Upjohn*, the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements is considered to be opinion work product. *Upjohn*, 449 U.S. 383, 399-400, 101 S.Ct. 677, 687-88, 66 L.Ed.2d 584 (1981). As Rule 26(b)(3) makes apparent, "opinion work product can not be

discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." *Murphy*, 560 F.2d at 336; *see also National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 983 (4th Cir.1992); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C.Cir. 1982). Instead, "opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Murphy*, 560 F.2d at 336.

[42,43] The crime-fraud exception presents one of the rare and extraordinary circumstances in which opinion work product is discoverable. The exception applies to work-product in the same way that it applies to the attorney-client privilege. *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir.1982); *see also In re Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir.1986); *Sealed Case*, 676 F.2d at 812; *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir.1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir.1979). Before the crime-fraud exception will be invoked, the plaintiffs must satisfy the two-part test of *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir.1987), which we discussed in subpart III.B, above. *See also In re Federal Grand Jury Proceedings 89-10 (MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991). Even if the Union engaged in an effort to conceal the unlawful activities of its negotiators, as a jury might find (see subpart II.B.2, above), after our own *in camera* inspection, we agree with the district court that the documents in question were not created to further any crime or fraud; nor are they closely related to any.

[44] The remaining two grounds on which the plaintiffs argue for reversal are not among the very rare and extraordinary circumstances in which opinion work product is discoverable. First, the plaintiffs argue that USX waived the privilege by asserting that it thought its actions were legal, and the Union

waived the privilege by allowing one of its attorneys, Kleiman, to testify at the criminal trial and by asserting that it was unaware of Rich and Phillips' actions. The subject-matter waiver doctrine provides that a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege. *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir.1987). However, as the Fourth Circuit has observed in *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988), *cert. denies*, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989), the subject-matter waiver doctrine does not extend to materials protected by the opinion work product privilege. The *Martin Marietta* court's reasoning was that the plain language of Fed.R.Civ.P.26(b)(3) suggests that opinion work product should not be subject to such an implied waiver, and that the rationale behind the doctrine (the fear that a party might "'make affirmative testimonial use'" of a communication and then seek to shield it from disclosure) does not apply to mental impressions and legal theories. *Id.* at 626 (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1223 (4th Cir.1976). We agree. Where a party asserts that he believed his actions to be lawful, he waives the attorney-client privilege as to what his attorney told him about the legality of his actions (see subpart III.C, above); his attorney's work product, however, is a different matter.

[45] The plaintiffs also argue that the *Garner* doctrine applies to work product. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir.1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), held that shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. The plaintiffs seek to extend that holding to apply to the relationship between the workers at the Fairfield plant and their Union and their pension fund, as well as to the work product privilege. However, the Fifth Circuit has held that the *Garner* doctrine does

not apply to attorney work product. *In re International Sys. & Controls Corp.*, 693 F.2d 1235, 1239 (5th Cir.1982) (footnotes omitted). We agree. Furthermore, at least as far as the Union is concerned, we have already held, in III.B above, that the *Garner* exception is not justified on the facts of this case. The district court therefore did not abuse its discretion, and its order is affirmed.

G. RULE 31 DEPOSITION OF ATTORNEYS

[46] The final discovery order that the plaintiffs appeal is the *sua sponte* ruling of the district court, pursuant to Rule 31, that the plaintiffs may depose the defendants' attorneys only by written questions. The plaintiffs argue that they should be allowed to take oral depositions, citing the hostility of the witnesses and the defendants' efforts at concealment. The district court reasoned that, "[i]n view of the plaintiffs' continuing efforts to breach the defendants' attorney-client privilege, the court is convinced that these depositions, in the absence of firm control by the court, will almost certainly be attended by continuing disputes and may require that they be supervised by a judicial officer." That order was not an abuse of discretion, and we affirm it.

IV. CLASS CERTIFICATION

[47] The district court declined to certify the plaintiff class for the plaintiffs' claims for equitable relief, and the plaintiffs seek to appeal. Because the plaintiffs seek rescission of the current Fairfield Works Agreement, the district court determined that the conflict between those members of the class who have been recalled to work under that agreement and those that have not made certification inappropriate. Because we do not have jurisdiction over the appeal, we do not reach the plaintiffs' arguments for reversal.

The decision of a district court denying class certification "does not of its own force terminate the entire litigation because

the plaintiff is free to proceed on his individual claim. Such an order is appealable, therefore, only if it comes within an appropriate exception to the final-judgment rule." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). The plaintiffs having shown no applicable exception to the final judgment rule, we dismiss their appeal without expressing any view on the merits. *See Gonzalez v. Texas Employment Comm'n*, 563 F.2d 776, 777 (5th Cir.1977)(dismissing appeal when "appellant, upon whom the burden to show jurisdiction rests, has not demonstrated the applicability of any of the exceptions to" the rule that denials of class certification are not immediately appealable) (internal citation omitted).

V. CONCLUSION

We REVERSE the district court's grant of summary judgment on the plaintiff's RICO claim against USX and the Union, as well as the court's grant of summary judgment on the plaintiffs' § 301 claim against USX for breach of contract. We also REVERSE the decision of the district court granting the defendants a protective order preventing plaintiffs from taking depositions to inquire into the Parton matter. Finally, we REVERSE the district court's decision that the *Garner* doctrine prevents the Union from asserting the attorney-client privilege against the plaintiffs. In all other respects, we AFFIRM, with the exception of the district court's denial of class certification as to the plaintiff's equitable and declaratory relief, which we have no jurisdiction to review.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; USX CORPORATION, a/k/a U.S. STEEL CORPORATION; and THE UNITED STATES STEEL & CARNEGIE PENSION FUND,
Defendants.

MEMORANDUM OF OPINION

[Entered December 16, 1991]

I. Introduction.

This is a civil action brought by a class of plaintiffs who are present and former employees of Defendant USX Corporation ("USX" or "the Company") in Jefferson County, Alabama and who were represented by the United Steelworkers of America, AFL-CIO-CLC ("the Union") at any time from July 1, 1983 to the present.[1] The plaintiffs accuse the Company, the Union and United States Steel & Carnegie Pension Fund ("the Fund") of wrongdoing in connection with the negotiation and implementation of the December 1983 Fairfield Works Agreement ("the "FWA") between USX and the Union. More specifically, plaintiffs claim that in response to demands of certain Union

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[1] The class was certified with respect to damages claims only.

negotiators, the Company agreed to amend its leave of absence policy for Union officials in such a way as to make those negotiators eligible for Company pensions to be paid by the Fund. The plaintiffs charge the defendants with: (1) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (Count I); (2) breach of the Union's duty of fair representation, and breach of contract by the Company, 29 U.S.C. § 185(a) (Count II); (3) violations of the National Labor Relations Act ("NLRA"), 29 U.S.C § 158(d) (Count III); (4) breach of Employee Retirement Income Security Act ("ERISA") fiduciary duties, 29 U.S.C. §1132 *et seq.* (Count IV); and (5) violations of 29 U.S.C. § 186 (Count V).

In Count I of their amended complaint, plaintiffs allege USX engaged in "racketeering activity" by giving the Union negotiators a "thing of value" in violation of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. Plaintiffs claim USX, with income from a pattern of the alleged racketeering activity, invested in, acquired or controlled, and conducted the affairs of the Fairfield Works,[2] the Fund, the Union and District 36 of the Union. The Union and the Fund allegedly conspired with the Company and with the Union negotiators to violate the provisions of 18 U.S.C. § 1962, in violation of 18 U.S.C. § 1962(d). Plaintiffs allege they were injured in their business or property because concessions in the Fairfield Works Agreement resulted in reduced compensation and fewer jobs.

In Count II of their amended complaint, plaintiffs sue USX for breach of contract and the Union for breach of its duty of fair representation, a so-called "hybrid § 301" claim brought under section 301 of the Labor Management Relations Act, 29 U.S.C.

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[2] Prior to 1964, U.S. Steel's operations in Fairfield were separately incorporated as the Tennessee Coal & Iron a& Railway Company. PA 262c. In 1964, the Company reorganized and all the subsidiaries, like Tennessee Coal & Iron, ceased to operate as subsidiaries and became just steel plants within the organization. PA 262b-262c.

§ 185(a).[3] Plaintiffs claim USX breached the 1983 and 1987 Basic Labor Agreements by operating the Fairfield Works pursuant to the Fairfield Works Agreement. Plaintiffs claim the Union breached its duty of fair representation by the negotiators' request for and acceptance of long term leaves of absence in return for making concessions to the Company.

In Count III of their amended complaint, plaintiffs claim the Union and USX committed an unfair labor practice in violation of 29 U.S.C. § 158(d) by failing to negotiate in good faith during the FWA negotiations.

In Count IV of their amended complaint, the plaintiffs claim the defendants violated the ERISA by failing to notify them or the Department of Labor of the amendment to the Company's Leave of Absence policy. Plaintiffs claim this failure was a breach of USX's and the Fund's fiduciary duties under ERISA. Plaintiffs also claim USX and the Fund breached their fiduciary duties by making wrongful payments from the Fund to the Union officials.

In Count V, plaintiffs seek an order enjoining defendants from committing violations of 29 U.S.C. § 186 in the future.

The action is now before the court on defendants' motions for summary judgment as to all counts of the plaintiffs' amended complaint. The motions have been fully briefed and are ripe for consideration.

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[3] In a hybrid section 301 claim, "a union member sues his employer for breach of the collective bargaining agreement, while also contending that his union breached its duty of fair representation. . . .A 'straightforward' section 301 claim involves a union suing an employer for breach of a collective bargaining agreement." *United Paperworks Int'l, Local #395, v. Itt Rayonier, Inc.*, 931 F.2d 832, 834 n. 7 (11th Cir.1991), *citing International Ass'n of Machinists and Aerospace Workers, Local Lodge No. 1688 v. Allied Products Corp.*, 786 F.2d 1561, 1563 (11th Cir. 1986).

II. Statement of Facts.[4]

In 1981, the Fairfield Works consisted of steel making and flat roll product operations. *Affidavit of Lewis Milton McClean, Jr., United Steelworker's Submission of Evidence*, P.189[5] A new Pipe Mill was due to be completed by the end of 1983. *Id.* The Company closed down the steel making and flat roll product operations at Fairfield in June 1982, because Fairfield had been experiencing losses in excess of one hundred million dollars per year for a number of years. *Id.* at 189-90. National steel production had dropped to a low level in 1982. *Id.* at 190. Lynn Williams, President of the Union, testified that 1983 was "one of the most horrendous periods in the Union history." Plaintiffs' Appendix, p.547.[6] During the Fairfield Works shut down, between June 1982 and January 1984, Union members employed at Fairfield did not pay dues unless the member earned a paycheck or collected vacation pay.[7] PA 561-562.

In September 1983, the Company and the Union began negotiations aimed at reopening the Fairfield Works. USWE 190. E.B. Rich and Thermon Phillips negotiated on behalf of the Union. Phillips was Director of District 36 of the International

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[4] Plaintiffs did not include a statement of facts in their brief. In an earnest attempt to find all the evidence favorable to plaintiffs, the court has extracted most of the statement of facts from plaintiffs' brief. The court has not included factual statements which were not supported by citation to the evidence, nor has it included factual statements which were supported by incorrect citations of evidence. Considering the immense amount of evidence the parties have accumulated, the plaintiffs have not chosen the most helpful way to present their case.

[5] The Union's submission of evidence will hereinafter be styled, "USWE".

[6] Plaintiffs' Appendix will hereafter be styled "PA".

[7] The Union members recommenced paying dues when the Works reopened. PA 555,565.

Union[8], and Rich was Sub-district Director for District 36. Although Rich and Phillips worked for the International Union, Theodore Stevenson, Jr. testified that he dealt with them about local issues rather than the presidents of the local unions. PA 232-236, 661.[9] At the inception of the negotiations, William Miller presented the Union negotiators with a proposed agreement containing all the concessions USX hoped to achieve. PA 130. The Company representatives advised the Union that if it could not achieve substantial labor cost reductions at the Fairfield Works, it intended to source the new Pipe Mill from the Lorrain or Gary plants of USX, and that it would give serious consideration to permanently shutting down the remaining portions of the Fairfield Works. USWE 191.

In the early days of the negotiations, E.B. Rich gave William Miller, Jr., [10] a list of names and, possibly, a draft of some language providing for indefinite Company leaves of absence for Union staff. PA 100a, 100b, 175, 191.[11] Mr. Miller gave the

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[8] Thermon Phillips was a member of the International Union's Executive Board, Secretary of the Union Negotiating Committee which negotiated the March 1, 1983 Basic Labor Agreement and the February 1, 1987 Basic Labor Agreement, and the Union Chairman of the Basic Steel Industry Audit and Review Committee. PA 660-661.

[9] There is no support in the cited record for plaintiffs' claim that Rich and Phillips were involved in processing grievances and arbitrations filed by rank-and-file members of the Union against the Company, or for plaintiffs' claim that Rich and Phillips had responsibility for implementing the FWA and the BLA. Mr. Stevenson did not discuss the procedure for handling grievances and arbitration, nor did he discuss Phillips' and Rich's role with regard to the collective bargaining agreements; he merely stated that he dealt with Rich and Phillips with regard to local matters, without elaboration. The court cannot assume Mr. Stevenson meant that Rich and Phillips had implemented the FWA and the BLA, or that they handled grievances and arbitration.

[10] Mr. Miller was one of the Company's negotiators.

[11] Rich relied on his Fifth Amendment right and refused to answer when he was asked if a Union attorney had reviewed the language. PA 179.

list of full time Union employees to Mr. Schick, who gave it to Mr. Hensarling[12] to get information about the people on the list. PA 100a-100b, 191. Mr. Schick testified that the matter was kept confidential because the negotiations were not public at that time. PA 195a-195b[13]

On October 27, 1983, Mr. Miller or Mr. Carney[14] questioned Thermon Phillips about leaves of absence. PA 169-177. Mr. Miller testified that Rich, Phillips and Carney were present with him at that meeting, where the leaves of absence for the nine individuals listed by Rich were discussed. PA 100g-100h. Mr. Miller's notes of that meeting indicate the leaves of absence were presented as "[a] condition of settlement." PA 294. Mr. Miller and Mr. Carney did not agree the pensions would be forthcoming, and they told Rich and Phillips they "knew of no way that that could be done." PA 100g, 100h. Nevertheless, Mr. Miller testified that the leave of absence issue was one of the pension items on the negotiating table in October of 1983. PA 100c.

Thermon Phillips testified [15] that, after the agreement was completed on December 23, he, E.B. Rich, Mr. Carney and Mr. Miller discussed the leave of absence matter in a small room across the hall from the larger room where they had been negotiating the Fairfield Works Agreement. PA 168-177. Although they did not raise the question on the last day of negotiations until after the agreement was complete, Rich and Phillips

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[12] It is apparent that Mr. Schick and Mr. Hensarling were Company employees, but plaintiffs have not provided evidence about their positions at USX. PA 100a-100b, 191, 169-77.

[13] Ted Stevenson, Jr. testified that he was not present at any meetings where leaves of absence and Company pensions for Union staff were discussed. PA 239.

[14] Mr. Carney was with the Company's law department. PA 100e.

[15] Mr. Phillips and Mr. Rich read portions of their previous grand jury testimony at their depositions, but otherwise refused to testify.

would not sign the final agreement until they had "an answer on their item." PA 101, 79-80, 114-116, 134-146. Miller testified that Rich and Phillips' signatures on the written agreement were essential. PA 141. Miller and Jim Carney spoke with J. Bruce Johnston and Miller told Johnston that he believed Rich and Phillips were serious in their refusal to sign the agreement until USX responded to their request. PA 79-81, 102. Miller testified that Johnston responded, without hesitation, by outlining specific and detailed conditions under which the Company would be willing to consider granting the leaves of absence and pensions. PA 80-81, 102-103, 286. Miller and Carney told Rich and Phillips of the specific conditions Johnston had given them. PA 104, 143-146.

Rich and Phillips signed the agreement after Miller told them he believed USX would favorably consider their request. Id.[16] The FWA was in its final form when Rich and Phillips raised the pension issue on the last day of negotiations, and it was not changed from its final form before it was signed. PA 101, 134-46.

The Fairfield Works Agreement of December 24, 1983 resulted in: (1) elimination of over 500 jobs in the Fairfield Works (PA 273-277, 404); (2) elimination of all incentive pay except direct incentive pay, which was capped at 135%(PA 278); (3) elimination of all prior local working conditions and past practices concerning, inter alia, manning, crew sizes, job assignments, hours of work, and coffee breaks (PA 272, 405); (4) combination of maintenance shops into central shops (PA 275-277); (4) transfer of the rail and transportation division to Birmingham Southern Railroad (PA 273-274); (5) contracting maintenance jobs (PA 276); (6) contracting janitorial and refuse hauling services (PA 277); (7) elimination of the biweekly 80

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[16] One of USX's conditions was that the pensions would be made retroactive to "March 1." PA 103, 286.

hour salary guarantee (PA 406); (8) granting to the Company full and sole discretion in determining manning and job assignments (PA 405); and (9) dismissal of pending complaints, grievances and arbitration cases. In August 1983, USX had estimated that the Fairfield Works would realize a profit of about $43 million in 1985, and in November 1983 USX had adjusted the estimated 1985 profit to $53 million. PA 471. In projecting the 1985 profit and loss, USX considered the impact of employee reductions, a 135% cap on direct incentives, elimination of indirect incentives, reduction in benefits to management levels and elimination of a bi-weekly salary guarantee. Id. In a December 20, 1983 analysis of savings associated with the Fairfield negotiations, the Company projected $23.5 million in annual net savings, including a $1 million savings from establishment of a management health care package. PA 474. However, in a December 23, 1983 telephone conversation, Phillips told Miller that the Union would not agree to the Company's first preference of a transfer to the management health care package, but that they would consider the Company's second preference, further reductions in the work force. PA 107-108.

Charles Schroeder of USX projected that USX would net employment cost savings associated with the final December 24 local agreement of $24 million per year. PA 404, 474. Larry Regan, President of Local 1014 at USX's Gary Works, stated by affidavit:

> Although USX was seeking local labor concessions in 1983 from the Union at several USX plants, the December 24, 1983 Fairfield Works Agreement contains the most severe concessions ever made to my knowledge in any local issues agreement ever negotiated between USX and the Union. To the best of my knowledge, no other steel plant in USX operates under the extreme labor concessions contained in the 1983 Fairfield Works Agreement.

PA 579. The Company made a commitment in the 1983 Fairfield Works Agreement to install a slab caster at Fairfield, but the caster was not operational until 1989. PA 182-183.[17] David Roderick testified that, on a long term basis, Fairfield Works would not be quality competitive or cost competitive without a Slab Caster. PA 188.[18] Details called for by the Fairfield Works Agreement were not finalized as late as October 1984. PA 217-218.[19]

On July 20, 1984, Miller sent Johnston a proposal Miller had received from Jack Golden[20] for an amendment to the Company's leave of absence policy to allow certain individuals to receive indefinite leaves of absence. PA 297b-297g. In response to a July 12, 1984 *Birmingham Post Herald* report that Fairfield Works union maintenance workers were being put on four day work weeks while the Company hired independent contractors

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[17]Mr. Roderick testified that the Company took a long time in determining what type of Caster to build, and that it took several years to engineer and build the Caster.

[18]On May 8, 1991, the *Birmingham Post Herald* reported that Fairfield Works was a semifinalist for the 1990 Alabama U.S. Senate Productivity Awards, and would receive a U.S. Senate Productivity Award Certificate of Merit recognizing productivity improvement. PA 643.

[19]There is no support in the cited portions of Mr. Short's deposition for plaintiffs' claim that the Fairfield Works Agreement negotiations continued into 1984. The Agreement was signed on December 24, 1983. At the portion of the deposition cited by plaintiffs, Mr. Short testified that the retirement of workers under the FWA was being done in a "piecemeal" fashion in 1984, and that someone known to him as "Butch" issued a memo in October 1984 stating that the retirees could not be dealt with in "dribs and drabs." Mr. Short testified it was a "detail" of the FWA that had not been finalized. He did not mention negotiations, nor did he indicate that additional negotiations were required.

[20]Mr. Golden was Director of the Union District 37. PA 297b. One of the conditions Bruce Johnston made on December 24, 1983 was that the proposal for the amendment to the leave of absence policy come from the International Union. PA 80-81.

to do maintenance work, J. Bruce Johnston wrote to William Miller, asking "What is the real story?" and "Are we in jeopardy of losing our momentum with E.B. and Thermon?" With respect to the second question, William Miller responded:

> . . . concerning Thermon Phillips and E. B. Rich, nothing in this incident has impacted our relationship with them. The thing they have their eye on, and the thing that will affect this relationship, is how we respond to the pension request which Jack Golden brought to us last week and which I forwarded to you last Friday.

PA 296-297. Miller wrote to Johnston on August 22, 1984, reminding Johnston of "this piece of unfinished business," and informing him that "E.B. Rich has called several times since learning of our organization changes, inquiring into the status of this matter." PA 297a. Thomas Sterling testified that he gave Rich a draft proposal for the change in August or September of 1984, and they had some discussion about an effective date of March versus September. PA 223-225. The final proposal to change the leave of absence policy was submitted to the Corporate Policy Committee on October 22, 1984. PA 421-22, 425. The change was to be effective retroactively to March 1, 1984. *Id.* In proposing the change, J. Bruce Johnston wrote:

> Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United

> States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.

PA 411. The Corporate Policy Committee adopted J.Bruce Johnston's proposal that allowed the Committee to approve longer indefinite leaves of absence to former employees while they worked for the International Union. The leaves of absence were to determine the Union employees' eligibility for Company pensions, and were available only to former employees of current steel producing operations who were actively employed by the Union in positions servicing bargaining units at the U.S. Steel division in which he had been employed. PA 411-412. In November 1984, six Union employees, including Rich and Phillips, applied for and received Company pensions from the United States Steel and Carnegie Pension Fund, retroactive to February 29, 1984. PA 298-383, 484-489. In addition to E.B. Rich and Thermon Phillips, extended leaves of absence were granted to Ralph Gurley, Carl Statum, Virgil Pierson, and Fred Shepherd. PA 648. Ed Owen of USX testified that he was told to not publicize the pensions when he was given the applications for processing. PA 157-159.

The corporate policy committee rescinded the revision of the USX leave of absence policy on May 14, 1987. PA 424-426. In May 1988, Phillips' pension was suspended, and the Fund began making payments into an escrow account. PA 446.[21] Lynn Williams, President of the Union, testified that his first information about the pensions came in a 1985 letter from J. Bruce Johnston, and that he referred the letter to Bernard Kleiman or Carl Frankel. PA 253, 255. The letter informed Williams that the

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[21] Although plaintiffs do not pursue the matter in brief, all of the pensions granted under the revised leave of absence policy were suspended.

Company had "approved requests for Leaves for six (6) International Union Representatives, qualifying those individuals for early retirements under the United States Steel Pension Plan." PA 434. In 1986, union employee Emmett Bruce Thrasher talked with Bernard Kleiman, General Counsel of the Steelworkers, and Mr. Kleiman denied any knowledge about pension negotiations. PA 544e-544h. Mr. Thrasher filed suit against the Union, USX and the Fund on October 16, 1986, seeking a pension from USX. PA 388a. The Union denied the allegations in paragraphs 29 and 30 of Thrasher's complaint, in which Thrasher claimed the settlement of the pipe mill agreement included pension credited service for Gurley, Phillips, Rich and Statum, and that those men received pension monies as a result of the Fairfield negotiations. PA 393, 388i, 388e-388h. In 1988, James Sommerville and George Elliot sued the Union, USX and the Fund. PA 617. In a motion to dismiss filed on March 17, 1988, the Union asserted that the pensions claimed by Sommerville and Elliot were illegal under 29 U.S.C.S. 186. PA 617-618. On April 13, 1988, the Union submitted the affidavit of Bernie Kleiman in the *Sommerville* case, in which Kleiman stated that Rich and Phillips had not retired from USX as of January 30, 1986. PA 493.

Lynn Williams testified that Union district directors commonly negotiated or arranged side letter agreements or contracts from the company to get unlimited leaves of absence, and the International Union never disciplined anyone for negotiating these agreements. PA 546. The "Manual for Representatives of the United Steelworkers of America" provides:

> 6. *Leaves of Absence and Pension Credits*
>
> Representatives shall be entitled to obtain and maintain leave of absence status and/or pension credits from employers only to the extent that such leaves of absence and/or pension credits are expressly granted or authorized by the terms of a collective bargaining agreement with the USWA,

and the duration of such leaves of absence an[SIC]/or pension credits shall be in strict conformity to the limitations provided in such collective bargaining agreement.

PA 387-388. Lynn Williams testified:

I believe that every employee of the Union, or Staff and our Directors, and so on, that come from the shops where our members work, ought to be entitled to an indefinite leave of absence so long as they serve the Union, ought to be entitled at whatever time in the future history, so long as they haven't left the Union, to go back to their original place of employment, and I disagree very much with the restrictions which are now clear in my mind which USX has put on that all these years in the Agreement. I would like us to have the kind of provisions I have described everywhere in the Union. I would look at it as one of our major failings as an institution, frankly, if we hadn't been able to do that nearly as successfully as we should have, and one of the reasons we haven't, in my judgment, is that our leaders have tended not to make as much an issue of that as we should have over the years, and consequently, when we came to a layoff situation, for example, in the Union, we were in this difficult period and we had to lay people off, a number of people that would have had seniority and would have been entitled to go back into the places from which they came and whose members they had been serving directly, and fellow employees that they had been serving directly or indirectly all of these years were just out of luck and couldn't go back. Other Unions, some of the Unions have been able to do much better than that . . . So, I think that anybody, any representative that can push the leave of absence question past that and enable us to get wedges out there that will enable us to move that whole leave of absence question forward, I would think in that instance, that is a good thing, and highly ethical.

PA 260-261.

Union negotiators E.B. Rich and Thermon Phillips were convicted of requesting and accepting payments from USX in violation of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186 and of conspiring to violate section 186. PA 643y, 643dd. USX was convicted of section 186 violations, ERISA violations, and mail fraud. PA 643w.

III. The Summary Judgment Standard.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct.2548, 91 L. Ed. 2d 265 (186). The party asking for summary judgment has the initial burden of demonstrating there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L. Ed. 2d 142 (1970). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23; *see* Fed. R. Civ. P. 56(a) and (b). However, "even after *Celotex*. it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

Once the moving party has met his burden, rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions of file,' designate `specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form

necessary for admission at trial, however she may not merely rest on her pleadings. *Id.*

Once a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n. 11, 103 S. Ct.2161, 76 L. Ed. 2d 277 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989), *Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988).

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict — "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Anderson, 477 U.S. at 252. Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d at 1540 n.12. Although summary judgment is ordinarily inappropriate to decide questions of scienter, knowledge, and intent, *see, e.g., Washington v. Dugger*, 860 F.2d 1018, 1020-21 (11th Cir. 1988), the court should consider absence of a plausible motive in making its decision. *Matsushita*, 475 U.S. at 595.

IV. The RICO Claims.

A. The Union.

The Union argues it cannot be held criminally liable for the Union negotiators' violations of 29 U.S.C. § 186, that it cannot be held vicariously liable under RICO for the Union negotiators' violations of 29. U.S.C. § 186, that it did not ratify the bribe-taking,[22] and that it is not liable for conspiring to violate section

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[22] The court recognizes that the defendants vigorously dispute the claim that the Union negotiators took a bribe from the Company, and uses the phrase only as a shorthand expression of the claims.

186. Finally, the Union argues the plaintiffs have not been injured by the alleged conduct.[23]

1. The Union's criminal liability.

The Union argues that it could not be held criminally liable for Rich and Phillips' section 186 violations,[24] and that it is, therefore, not guilty of racketeering activity.

Racketeering activity consists of acts for which the defendant could be subject to criminal sanction. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488, 105 S.Ct. 3275, 87 L.Ed.2d 346, 354 (1985). In *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962), the former Fifth Circuit held that a corporation could be found criminally liable for the acts of even its most menial employee, if the acts were performed within the scope of their employment. *Id.* at 127-8. "To be acting within his employment, the employee must have intended that his act would produce some benefit to the corporation or some benefit to himself and the corporation second." *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984).[25] The *Standard Oil* court said:

> If it is done with a view of furthering the master's business, of doing something for the master, then the expectation or

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[23] The Union also joins in the Company's argument, discussed below, that the plaintiffs have not shown a "pattern" of racketeering activity.

[24] The predicate acts for plaintiffs' RICO claim are alleged violations of Section 302 of the Taft-Hartley Act, 29 U.S.C.§ 186. Subsection (a) of Section 186 prohibits, with some exceptions, payments by employers to employee representatives. Subsection (b) prohibits any person from requesting, demanding, receiving or accepting any payment prohibited in subsection (a).

[25] Since the civil right of section (18 U.S.C.§ 1964) and criminal liability (18 U.S.C. § 1963) both arise out of violations of section 1962, the statute is interpreted the same in both civil and criminal matters. *See Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 n.2 (11th Cir. 1986).

> hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse.

Standard Oil, 307 F.2d at 128-9. *See Local 1814, International Longshoremen's Ass'n. v. NLRB*, 735 F.2d 1384, 1394-5 (D.C. Cir. 1984)(The ordinary law of agency is applicable under the Taft-Hartley Act to the attribution of individual acts to employers and unions; the union is responsible for the acts of its agent even where self-interest is the predominant motive so long as the agent is actuated by the Union's business purposes to any appreciable extent).[26]

The Union argues the pensions received by the Union negotiators were taken solely to serve the negotiators' interests and not to benefit the Union.[27] It claims that it could not, therefore, be subject to criminal sanctions under section 186. Plaintiffs

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[26] The Union argues the agency principles applied in *Local 1814* do not apply here because *Local 1814* was not a RICO case or a criminal case under § 302. It contends that the statute at issue in *Local 1814*, the NLRA, is unlike RICO in that it is predicated on respondeat superior liability. However, respondeat superior liability is clearly applicable to the RICO predicate acts at issue here, violations of 29 U.S.C. § 186. *See* 29 U.S.C. § 185(b)(providing "[a]ny labor organization which represents employees in an industry affecting commerce . . . shall be bound by the acts of its agents"). Therefore, the Union could be found criminally liable for its agents' violations of 29 U.S.C. § 186. Section 185(e), which provides that actual authorization or subsequent ratification of the specific act is not controlling in determining whether any person is acting as the agent of another, is nearly identical to the provision at issue in *Local 1814*. 29 U.S.C. § 185(e), 29 U.S.C. § 152(13).

[27] The Union cites portions of plaintiffs' complaint in support of its claim that only the negotiator's interests were served by the receipt of pension benefits. Nowhere does the complaint contain allegations that suggest the Union negotiators intended to benefit only themselves, and that conclusion is not a necessary inference from the allegations.

argue the Union benefitted from the negotiators' actions because: (1) the Union benefitted from the Fairfield Works Agreement; (2) the Union saved the salaries and expenses of Ralph Gurley, Carl Statum and Virgil Pearson, who retired early from the Union upon getting the pension benefits from USX; and (3) the Union benefitted from the "leaves of absence and payment of pension benefits to Union representatives and officials," according to Union President Lynn Williams. Evidence that the Union benefitted from the negotiators' actions may be probative in determining whether the agents' purpose and motive was to benefit the Union. *Standard Oil*, 307 F.2d at 128.

Concerning the plaintiffs' first contention, evidence that the Union derived benefits from the Fairfield Works Agreement is not, alone, proof the Union benefitted from Rich and Phillips' violations of section 186. The plaintiffs have not articulated any argument in support of their claim that the benefits the Union received from the Fairfield Works Agreement were the equivalent of benefits from the section 186 violations.[28] As to plaintiff's second response, there is no showing that the Union benefitted from the retirements of its officials. The Union could not have saved the salaries and expenses of retiring Union officials unless it did not replace them, and there is no showing that the Union left those jobs vacant.

Lynn Williams' opinion, that Union employees should get indefinite leaves of absence from the shop in which they previously worked so they could go back to their old job if the Union

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[28] Plaintiffs have cited a case in which a union obtained a company's agreement to the unionization of its shop and payments to union officials in return for a union promise to steer other business to the company. There is no evidence here, however, that the Union obtained USX's agreement to the FWA because of the section 186 violations. Other than citation of the case, plaintiffs made no argument or claim that USX would not have signed the Fairfield Works Agreement but for the section 186 violations. Plaintiffs' Brief, pp. 46-47.

had to lay them off, is not evidence that the Union benefitted from the Company's change of its leave of absence policy. PA 258-262. The leave of absence policy affected pension benefits, not recall rights. PA 411-412. Plaintiffs have, however, presented evidence that District 36 officials other than the Union negotiators applied for and received extended leaves of absence from the Company. Plaintiffs' Brief at 50, PA 298-382. Furthermore, although only Union officers of District 36 received leaves of absence, the policy as written applied to any Union official who had been employed in United States Steel Corporation's steel producing operations. PA 412. Evidence that Union officials other than the negotiators benefitted or could have benefitted from the negotiator's demand for leaves of absence is circumstantial evidence that the negotiators intended to benefit the Union. Therefore, plaintiffs have some evidence tending to show the Union could be criminally liable under section 186 for the negotiators' demand of leaves of absence from the Company, 29 U.S.C. § 186(b)[29], and the Union's motion for summary judgment will be denied insofar as it is based on the claim that the Union cannot be criminally liable for the negotiators' actions.

2. The Union's Civil Liability.

The Union argues it cannot be found civilly liable for RICO violations under principles of vicarious responsibility, since it is a "victim" enterprise. It contends the main purpose of RICO is to address the infiltration of legitimate business by wrongdoers, and the essence of plaintiffs' claim is that the Union was misused by the Company and the Union negotiators.

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[29] The Union argues the plaintiffs cannot cite a case in which a Union was found criminally culpable for the bribing of its officials by an employer. The present RICO action does not rest on bribery, but on violations of Section 186. Section 186 does not require evidence of a quid pro quo. 29 U.S.C. § 186.

The majority of the circuits have found that, for the purposes of section 1962(c)[30], a victim enterprise cannot be held liable under RICO. *See, e.g. Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358-59 (3rd Cir. 1987). However, in *United States v. Hartley*, 678 F. 2d 961, 987-90 (11th Cir. 1982), the Eleventh Circuit held a corporation may be simultaneously both a defendant and the enterprise under section 1962(c). *Id.* The Union suggests that the Eleventh Circuit would limit the rule to those situations in which the corporation is a central figure in the criminal scheme as it was in *Hartley* and would not find an enterprise corporation vicariously liable for the acts of its agents when the corporation is a passive instrument or victim of the racketeering activity. *See Haroco Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400-402(7th Cir.1984).

The Union relies on the plaintiffs' pleadings to support its claim that it is a "passive instrument" or "victim" enterprise. In paragraph 87 of their complaint, plaintiffs allege the Union was an enterprise which the Company established, maintained, and controlled with income derived from a pattern of racketeering activity, and they also allege the Union conspired with the Company to violate subsections 1962 (1), (b), and (c). The same conspiracy claim appears in paragraphs 85, 86, and 88, but the Union is not the alleged victim enterprise in those paragraphs. Plaintiffs allege that the Fairfield Works was the victim enterprise in paragraph 85, that the Fund was the victim enterprise in paragraph 86, and that District 36 of the Union was the victim enterprise in paragraph 88. Since plaintiffs are free to plead in the alternative, they need not consistently pursue the theory that the Union was the victim enterprise. Fed.R.Civ.P. 8(e)(2). The factual allegations underlying plaintiffs' RICO claim are (1)

[30] Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise. . . to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity. . .

during the Fairfield Works negotiations, the Union negotiators asked for or received from the Company extended leaves of absence for pension benefits; (2) the Company agreed to give the Union negotiators extended leaves of absence for pension benefits; (3) the Company's Corporate Policy Committee revised the leave of absence policy to allow for the pensions on October 4, 1984; and (4) the Company thereafter began providing leaves of absence for pension benefits to six Union employees, including the Union negotiators, and began paying pension benefits to those Union employees. Plaintiffs' February 28, 1989 Amended Complaint, para. 76-89, 20-21, 30-37, 40. Nowhere does the complaint include allegations that the Union was injured by the Company's payment of pension benefits to Union employees. Neither can the court conclude the Union was a victim from the plaintiffs' allegations that the Fairfield Works Agreement was affected by bribe-taking and the plaintiffs were injured thereby. Although plaintiffs claim they were injured by concessions in the Fairfield Works Agreement resulting from the corruption of the negotiating process, the injury to the plaintiffs is not necessarily injury to the Union. The court cannot presume the Union was damaged because its members may have been damaged.

The Union's claim that it is a "victim" enterprise is, therefore, unsupported in the record. Since the Union has cited no other evidence in support of its claim that it is a "victim" enterprise, it has not shifted the burden of coming forward with evidence to the plaintiffs. Additionally, as discussed above, the plaintiffs have some evidence tending to show that the Union benefitted from the negotiators' actions, since Union officials other than the negotiators received USX leaves of absence.

3. Ratification and other theories of civil liability.

In addition to their general claim that the Union is civilly liable for the negotiator's acts, the plaintiffs press several specific theories of civil liability.

a. Apparent Authority.

Plaintiffs argue the Union is civilly liable for the negotiators' acts even in absence of a benefit to the Union because its negotiators were acting with apparent authority and the Union did not disavow or repudiate their acts.[31] *Amendolare v. Schenkers Int'l Forwarders, Inc.*, 747 F.Supp. 162, 170 (E.D.N.Y. 1990), *N.L.R.B. v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976).

An agent has apparent authority to bind the principal where the principal has held out the agent as having such authority or has permitted the agent to represent that the has such authority. *United States v. Schaltenbrand*, 930 F.2d 1554, 1560 (11th Cir. 1991). The essential characteristic of an agency is the power of the agent to commit his principal to business relationships with third parties. *Id.* In *Amendolare*, the court said ". . . a principal may be liable for the acts of an agent acting with apparent authority even where there is no benefit to the principal." *Amendolare*, 747 F.Supp. at 170, citing Restatement (Second) of Agency § 261. However, that Restatement section applies only where the principal puts the agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons. *Id.* The *Amendolare* plaintiffs claimed they were defrauded by Union officials. Here, the plaintiffs do not claim the Union negotiators, acting with apparent authority, made misrepresentations to them upon which they relied. Therefore, *Amendolare* does not apply in this case. If the negotiators had apparent authority to demand leaves of absences from the Company, and the court does not so decide, there is no evidence the plaintiffs relied on that apparent authority to their detriment.

[31] Plaintiffs present Lynn Williams' testimony (that he believed Union representatives should get leaves of absence for recall rights) in support of their claim that the negotiators had apparent authority to negotiate for the leaves. Plaintiffs also claim that evidence the Union did not discipline employees for negotiating regarding these types of leaves of absence is evidence that the negotiators' had apparent authority to act.

b. Ratification.

The plaintiffs also claim the Union is vicariously liable for the negotiator's actions because it ratified their act by overt actions, or by failing to act after gaining knowledge of the negotiator's acts. "A ratification occurs when the benefits of the purportedly unauthorized acts are accepted [by the principal] with full knowledge of the facts under circumstances demonstrating the intent to adopt the unauthorized arrangement." *In re Securities Group*, 926 F.2d 1051, 1055 (11th Cir. 1991)(citations omitted). The existence of a ratification depends upon the circumstances and is a question to be determined by the factfinder. *Id.* "A principal can ratify the unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." *McDonald v. Hamilton Electric, Inc.*, 666 F.2d 509, 514 (11th Cir. 1982).

The Union argues the issue of ratification does not arise unless the acts were undertaken by the negotiators on behalf of the Union, *citing McDonald*, 666 F.2d at 514, Restatement (Second) of Agency §§ 82, 85, at 210, 217-18 (1958). As noted above, the plaintiffs have some evidence tending to show that the negotiators' actions benefitted the Union, and the plaintiffs' claim that concessions in the Fairfield Works Agreement damaged them is not evidence that the Union was damaged by those same concessions, since the interests of the Union are not necessarily coextensive with the interests of the Union members. Thus, the Union has not pointed to evidence supporting its claim that Rich and Phillips were betraying the Union for their own benefit.

The Union further argues it cannot be said to have ratified the negotiators' actions absent evidence that it had knowledge of a bribe and, since there is no evidence that the negotiators exchanged concessions for pensions, there is no evidence the Union had knowledge of a bribe. Although evidence of a *quid pro quo* may be relevant to plaintiffs' claims for damages, it is

not an element of the section 186 violations. Section 186 provides that it is unlawful merely to "request, demand, receive, or accept . . . any. . . thing of value." Therefore, to prove the Union ratified the predicate acts, plaintiffs need not prove the Union had knowledge that the negotiators had taken a bribe, but that the Union knew that the negotiators received or accepted the leaves of absence from the Company. Furthermore, the Union has not sustained its burden of showing there is no genuine issue of material fact as to its knowledge merely by claiming plaintiffs have no evidence that the Union had knowledge. *Coats & Clark*, 929 F.2d at 608.

The Union also contends it did not ratify the negotiators' actions, citing *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). Again, the Union made no specific reference to the evidence and has not, therefore, shifted the burden of coming forward with evidence to the plaintiffs. *Coats & Clark*, 929 F.2d at 608. Plaintiffs argue the Union affirmed the actions of Rich and Phillips after gaining full knowledge of the material facts. Plaintiffs' brief at 55-56, *citing Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980), *Rodonich v. House Wreckers Union Local 95 of Laborers Int'l Union*, 624 F.Supp. 678, 685 (S.D.N.Y. 1985), *modified* 817 F.2d 967 (2d Cir. 1987); *Borowiec v. Local 1570 of Int'l Brotherhood of Boilermakers, etc.*, 626 F.Supp. 296, 304 (D.Mass. 1986); *Teas v. Local 413, Int'l Brotherhood of Teamsters, etc.*, 504 F.Supp. 12 (S.D. Ohio 1978).[32] Plaintiffs also argue the Union ratified the negotiators' actions when it failed to investigate or act to curb the negotiators' actions after it gained knowledge of their acts, citing *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d, 1384, 1396-97

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[32] In *Teas*, the court noted the defendant had the power to cease collection of an unauthorized dues increase, but it did not stop the collection after it had knowledge the dues increase was unlawfully imposed. The plaintiffs here have presented no evidence that the Union had the power to stop the pension payments to Rich and Phillips.

(D.C. Cir. 1984), *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, and Helpers Local Union 639*, 839 F.2d 782, 786 (D.C. Cir. 1988), vacated__U.S.__, 109 S. Ct. 3235, 106 L.Ed.2d 583 (1989), *replaced by* 913 F.2d 948 (D.C. Cir. 1990)(union's knowledge of illegal strike coupled with failure to act was proof that union participated or authorized or ratified actions for purposes of 29 U.S.C. § 106).[33]

In support of their claim that the Union overtly or implicitly ratified the negotiators' actions, the plaintiffs point to the letter Union President Lynn Williams received from J. Bruce Johnston on or about March 5, 1985,[34] In the letter, Johnston informed Mr. Williams that six unnamed International Union representatives had received longer leaves of absence from the Company than was provided for in the Basic Labor Agreement. PA 253-257, 434-435. Johnston did not inform the Union that the change came about because of the Fairfield negotiations, or because of any request by the Fairfield negotiators. The Union therefore cannot be said to have impliedly ratified the negotiators' acts by failing to act on the information in the letter, since there was no information about the negotiators' acts in the letter. Plaintiffs also point to evidence that Bernard Kleiman, general counsel for

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[33] In a strike context, "[t]here can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred. . . What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." *United Mine Worker of America v. Gibbs*, 383 U.S. 715, 739, 86 S.Ct. 1130, 1145 (1966).

[34] Plaintiffs have not claimed, nor have they produced evidence, that the Union knew of the negotiators' actions before 1985, when Lynn Williams received the letter from Bruce Johnston informing him that six union representatives had received extended leaves of absences and company pensions. There is no evidence in the record to show that, even then, the Union knew the leaves of absences were discussed during the 1983 Fairfield negotiations.

the Union, denied knowledge of pension negotiations in 1986 conversations with Bruce Thrasher. PA 544e-544h. That evidence does not tend to prove that the Union overtly ratified the negotiators' actions by trying to "cover-up" without a showing that Mr. Kleiman knew of the pension negotiations when he spoke with Thrasher in 1986. Plaintiffs also contend that, on March 17, 1988, the Union filed a motion to dismiss in *Sommerville*, in which it claimed that the pension James Summerville sought under the Company's revised leave of absence policy violated 29 U.S.C. § 186. Again, there is no evidence the Union had any knowledge of the truth of the allegations in the *Sommerville* action, and its motion to dismiss is not, therefore, proof of an attempt to cover-up or a failure to act after gaining full knowledge of the truth.[35] The Union's knowledge of James Summerville's allegations of section 186 violations by Union negotiators is not the same as knowledge of section 186 violations by Union negotiators.[36]

However, if plaintiffs can satisfy a jury that the Union benefitted from the arrangement between USX and the Union officials, the jury may find the Union's retention of Rich and Phillips in their offices after the Union had notice they were receiving Company pensions in violation of section 186 "is tantamount to acquiescence or condonation of their unlawful acts." *Local 1814*, 735 F.2d at 1396. Furthermore, although the evidence plaintiffs presented here does not support their claim that the Union

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[35] Plaintiffs allege that the Union took no action against Rich and Phillips until after their convictions, but the citation provided by plaintiffs is inaccurate. See Plaintiffs' Brief, p.58, PA 651.

[36] The Union also claims any "ratification" by another Union official could not be attributed to the Union, repeating its argument that the Union cannot be vicariously liable because it received no benefit from the alleged Section 186 violations. As noted above, the plaintiffs have presented some evidence tending to show the Union benefitted from the negotiator's actions, and there is no evidence to support the Union's claim that it was a "victimized" enterprise.

overtly or impliedly ratified the negotiators' actions, plaintiffs are entitled to further discover on this issue. Plaintiffs have relied on the letter Lynn Williams received in 1985 as proof that the Union had knowledge of the negotiators' acts. As discussed above, the letter itself did not provide the Union with any information about the negotiators' actions and it does not support the plaintiffs' ratification theory. However, plaintiffs have not been able to finalize discovery about the Union's response to the letter, since that discovery is the subject of an interlocutory appeal. Plaintiffs have not been able to complete their discovery of Mr. Kleiman for the same reason. Plaintiffs are, therefore, entitled to reserve this claim pending the outcome of the appeal. Finally, as noted above, the Union has failed to satisfy its burden of pointing to evidence showing that it did not adopt the negotiator's actions, and the Union has, therefore, failed to shift the burden of coming forward with evidence to plaintiffs on this issue. The Union's burden on summary judgment is not satisfied merely by arguing the plaintiffs have no evidence to support an element of their claim. *Coats & Clark*, 929 F.2d at 608.

c. Fiduciary Duty.

At various points in their brief, the plaintiffs claim the Union is liable for the negotiators' actions because the Union owed them a fiduciary duty to negotiate faithfully and solely on behalf of the plaintiffs and class members, citing *United States v. Boffa*, 688 F.2d 919, 930 (3rd Cir. 1982)[37] and *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671 (D.Kan. 1986). Plaintiffs' Brief, p. 22, 53-54, 61, 78.

Plaintiffs argue the Union is vicariously liable for the negotiators' acts because it is a fiduciary to the plaintiffs and it acqui-

[37] The court finds *Boffa* inapposite. It involved the fiduciary duty owed by union officials to union members under 29 U.S.C. § 501(a), not fiduciary duties owed by the union itself. *See Erkins v. Bryan*, 785 F.2d 1538, 1544(11th Cir. 1986); *United States v. Boffa*, 638 F.2d 919, 930 (3rd Cir. 1982).

esced in or concealed a breach of trust by its co-fiduciaries, it permitted the agents' actions, it did not use reasonable care in retaining the agents, and it failed to take steps to compel its co-fiduciaries to redress their breach of trust. Plaintiffs' Brief, p. 53-54, citing Restatement (Second) of Trusts, §§ 224(2)(c) and (e), 225(2).

The Union's duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n Int'l v. O'Neill*, __U.S.__, 111 S.Ct. 1127, 113 L.Ed.2d 51, 62 (1991).[38] As the exclusive bargaining representative of the employees at Fairfield, the Union has a statutory duty to fairly represent all of the employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The duty also applies in "other instances in which a union is acting in its representative role...." *O'Neill*, 113 L.Ed.2d at 62. "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* A union owes employees a duty to represent them adequately as well as honestly and in good faith. *O'Neill*, 113. L.Ed.2d at 62, citing Restatement (Second) of Trusts § 174 (1959). Mere negligence will not be a violation of the duty. *Rawson*, 496 U.S. at __, 109 L.Ed.2d at 377. Because the duty of fair representation is imposed on the union

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[38] A union is not prohibited from assuming additional duties to the employees by accepting a duty of care through a contractual agreement, but the employee claiming the union owes him a more far-reaching duty must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees. *United Steelworkers of America v. Rawson*, 496 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362,376 (1990).

as a result of its position as exclusive bargaining representative, it applies only to union conduct arising from the Union's position as representative. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062 (5th Cir. 1980). Thus, the union owes the duty to represent fairly the interest of each employee in the unit in dealings with the employer, but union conduct that affects only an individual's relationship within the union structure is not subject to the duty of fair representation. *Id.* at 1062-63.

Plaintiffs claim the Union, because of its fiduciary status, should have fired the negotiators once they were accused of a breach of trust, and should have made the negotiators redress the alleged breach of trust. Although the union has a fiduciary duty to its members which may have some common law overtones,[39] the duty extends only to the union's actions in dealing with the plaintiffs' employer. The plaintiffs have presented no support for their claim that the Union's fiduciary responsibility implicates the Union's relationship with its own employees.

Furthermore, under the common law the Union would become liable for the negotiators' breach of trust if it failed to fulfill its own fiduciary duties; it would not become vicariously liable for all the negotiators' criminal actions. Restatement (Second) of Trusts, § 224(1) and § 225, Comment A. The plaintiffs have made no coherent argument in support of their claim that such a breach of fiduciary duty would make the Union vicariously

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[39] Although the court in *Shimman v. Frank*, 625 F.2d 80, 99 n. 39 (6th Cir. 1980), seemingly rejected the idea that the fiduciary duty of union officials was derived for the common law, the court notes that the union's fiduciary duty does have some common law roots. *See O'Neill*, 113 L.Ed.2d at 62 ("a union owes employees a duty to represent them adequately as well as honestly and in good faith. . . ." (citing Restatement (Second) of Trusts § 174)); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Crt. 1339, 108 L.Ed.2d 519, 529 (1990)(court analogizes unions' duty of fair representation to that of a trustee to the trust beneficiary, citing Restatement (Second) of Trusts § 199(c)).

liable for the negotiators' racketeering activity. A breach of fiduciary duty is not, in itself, racketeering activity constituting a predicate act under RICO. 18 U.S.C. § 1961(1). The union is, therefore, entitled to summary judgment on plaintiffs' claim that it is vicariously liable for the negotiators' RICO violations because it is guilty of a breach of its fiduciary duty of fair representation.

Plaintiffs also claim the Union is guilty of aiding and abetting even if it committed no overt act in support of the negotiators' actions because it was silent in the face of a fiduciary duty to disclose "material facts affecting the interest of the beneficiary which [it] knows the beneficiary does not know and which the beneficiary needs to know for his own protection...." Plaintiffs' Brief, p. 61-62, citing Restatement (Second) of Trusts, § 173, Comment D.[40] To establish liability for aiding and abetting, plaintiffs must show the Union participated in the criminal venture through an overt act designed to aid in the success of the venture. *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981). Proof of "mere negative acquiescence" is insufficient to establish aiding and abetting liability. *Armoc Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 486 (5th Cir. 1986). Plaintiffs' reliance on *United States v. Local 560 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and*

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[40] The court makes no decision regarding the existence of such a duty. Plaintiffs cite *Baskin v. Hawley*, 807 F.2d 1120, 1131 (2nd Cir. 1986) in support of their claim that the Union has a duty to disclose to its members information that it knows might give the members a claim against the Union. *Baskin* does not support the plaintiffs' argument, since the issue there was whether an active concealment of a known injury tolled the statute of limitations. *Id.* There is no support in the *Baskin* case for plaintiffs claim that the Union has a general duty to disclose information to its members, or for plaintiffs claim that the Union would be guilty of aiding and abetting if the Union failed to fulfill such a duty. The *Baskin* court held merely that a union's active concealment of a cause of action from its members tolled the statute of limitations.

Helpers of America, et. al., 780 F.2d 267, 284 (3rd Cir. 1985) is misplaced, since the defendants in that action had committed one or more overt acts, and only their intent to facilitate the crime was inferred from proof that they knew of the commission of the crime and failed to act when they had an affirmative duty to do so. *Id.* Neither does *Brennen v. Midwestern United Life Ins. Co.*, 259 F.Supp. 673 (N.D.Ind. 1966) support plaintiffs' position since it involves aider and a bettor liability under section 10(b) of the Securities Exchange Act of 1934. *See Schneberger v. Wheeler*, 659 F.2d 1477, 1480 (11th Cir. 1988). The court has been unable to find a similar application of the rule outside the context of the 1934 Act. Therefore, the Union is entitled to summary judgment on plaintiffs' claim that it is liable as an aider and abettor due to its failure to disclose the negotiators' actions.

Plaintiffs also claim the Union, because of its fiduciary status, is liable as a co-conspirator "simply because the Union failed to disclose or stop the illegal acts of Rich and Phillips even though the Union clearly had the power to do so." Plaintiffs' Brief at 74. The Union's failure to act upon knowledge of the negotiators' actions may be some evidence which tends to show the Union was a co-conspirator, but plaintiffs have cited no support for their claim that the failure to act coupled with a fiduciary duty to act,[41] by itself, makes the Union liable for conspiracy. The Union is entitled to summary judgment on plaintiffs' claim that it is liable for the negotiators' RICO violations because it breached its duty of fair representation.

d. Aiding and Abetting.

In addition to the claim that the Union's silence in the face of an affirmative fiduciary duty to speak made the Union liable as

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[41] The court does not decide whether the Union had a fiduciary duty to disclose any information about illegalities in the negotiating process. It only concludes that any such failure would create liability for a breach of fiduciary duty only, not liability as a co-conspirator or aider and abettor.

an aider and abettor, plaintiffs claim the Union is liable as an aider and abettor because it committed three overt acts designed to facilitate the negotiators' criminal activity. Plaintiffs refer to the Union submissions in *James Sommerville, et al. v. United Steelworkers of America, AFL-CIO-CLC, et al.* CV-88-G-0105-S, its answer in *Emmett Bruce Thrasher v. United Steelworkers of America, AFL-CIO-CLC, et al., CV-86-C-1930-S*, and Bernard Kleiman's representations to Bruce Thrasher that he had no knowledge of the Union negotiators' pensions.[42]

One who aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is punishable as a principal. 18 U.S.C. § 2. The Third Circuit has found that an aider and abettor of two predicate acts can be civilly liable under RICO. *Petro-Tech, Inc. v. Western Company of North America*, 824 F.2d 1349, 1356 (3rd Cir. 1987), and *see Armco Industrial Credit Corp. v SLT Warehouse Co.* 782 F.2d 475, 486 (5th Cir. 1986). As noted above, to establish liability for aiding and abetting, plaintiffs must show the Union participated in the criminal venture through an overt act designed to aid in the success of the venture. *United States v. Hewitt*, 663 F.2d

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[42] Plaintiffs claim they need depositions of several Union officials to establish the Union's knowledge of the pensions, and they have been unable to complete those depositions due to the pending appeal. The courts' December 5, 1990 and January 10, 1991 discovery orders are the subject of a pending interlocutory appeal. The December 5, 1990 order related only to Company officials. However, the January 10 order concerned the proper application of the attorney-client privilege to a conversation between Lynn Williams and Bernard Kleiman about the 1985 letter, and to production of documents, particularly to notes made by Kleiman during the Thrasher conversations which the court found to be undiscoverable work product. Although questioning of Kleiman about his knowledge of the 1983 negotiations at the time he spoke with Thrasher does not require production of his notes, it may implicate Kleiman's conversation with Williams. As discussed below, plaintiffs are entitled to complete their discovery of Kleiman before responding to the Union's summary judgment motion on this issue.

1381, 1385 (11th Cir. 1981). To prove aiding and abetting, the plaintiffs must establish: (1) The Union associated itself with the crime; (2) the Union intended to bring the crime about; (3) the Union sought by its actions to make the crime succeed; and (4) the Union shared the same unlawful intent as the actual perpetrator. *United States v. Kelly*, 888 F.2d 732, 742 (11th Cir. 1989); *United States v. Hamblin*, 911 F.2d 551, 557-58 (11th Cir. 1990). Proof of "mere negative acquiescence" is insufficient to establish aiding and abetting liability, there must be evidence that the Union committed an overt act designed to aide in the success of the venture. *Armco Industrial Credit Corp. V. L.L.T. Warehouse Co.*, 782 F.2d 475, 485-86 (5th Cir. 1986). *Armco*, 782 F.2d at 485.

Plaintiffs have identified three acts which they claim are affirmative acts on the part of the Union which aided in the success of the venture: (1) the Union's December 1, 1986 answer in *Thrasher*, in which it "[denied] that [Thermon] Phillips received a Company pension" (Plaintiffs' Brief, P.60); (2) the affidavit Bernard Kleiman[43] submitted in *Sommerville* in which he stated that the Union negotiators had not retired from the Company by 1986; and (3) Bernard Kleiman's 1986 conversations with Bruce Thrasher, in which he denied knowledge of the pension negotiations or Thrasher's eligibility for a pension. The plaintiffs have not articulated any basis for their claim that these actions on the part of the Union constituted aiding and abetting, but they are presumably claiming the Union aided in the cover up or concealment of the section 186 violations.[44]

In the *Thrasher* complaint, the plaintiff alleged "the settlement to the pipe mill agreement included pension credited

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[43] Mr. Kleiman is general counsel for the Union.

[44] In their complaint, the plaintiffs do not allege the Union's RICO liability is predicated on aiding and abetting liability. They have not articulated a theory of aiding and abetting liability in either their complaint or their brief in opposition to the Union's summary judgment motion.

service for . . . Thermon Phillips . . ." and "[Phillips] currently and . . . in the past received pension monies as a result of the negotiations referred to herein." PA 338i. The Union merely denied those allegations. PA 393. The Union argues the denial was correct since no agreement was reached in the negotiations and the Company unilaterally decided to provide the pension credit and pensions ten months after the negotiations were concluded. The question of whether the pension were received as a result of the Fairfield negotiations is a disputed question of fact, and the Union is not entitled to summary judgment on that basis. It has not challenged the plaintiffs' evidence on any other ground.[45]

Bernard Kleiman submitted his affidavit in *Sommerville* on April 13, 1988. Mr. Kleiman stated that, "as of January 30, 1986, Ralph Gurley, Thermon Phillips, E. B. Rich and Carl Statum were active employees of the International Union and had not retired from USX." PA 493. The Union readily admits Phillips and Rich were retired from USX by January 30, 1986, but claims the date in Kleiman's affidavit was a mistake copied from the *Sommerville* plaintiffs' complaint. See Union Evidence, p. 149. It also argues there was nothing misleading in the memorandum to which the affidavit was attached, since the affidavit was cited in support of a claim that the negotiators were employed by the Union at the time of the negotiations. The Union makes a persuasive argument, but the court cannot decide on summary judgment if the statement was due to neglect or design.

Plaintiffs also argue that, in 1986, Bernard Kleiman denied knowledge of the pensions given to Rich and Phillips. The Union argues the evidence is undisputed that Kleiman knew nothing about the pension negotiations. There is no evidence

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[45] The Union also argued that it cannot be liable as an aider and abettor since it is a victim enterprise. As noted above, the Union's claim that it is a victim enterprise is unsupported in the record.

that Kleiman had knowledge of the pension negotiations at the time he made the denials, but plaintiffs have not completed their discovery and, in particular, have been unable to completely depose Kleiman during the pendency of the interlocutory appeal as to discovery issues. Therefore, the present lack of evidence about Kleiman's knowledge of the pensions cannot form the basis for summary judgment. Rule 56(f), Fed.R.Civ.P.

Although the court is not overwhelmed with the strength of plaintiffs' case for aiding and abetting liability, the plaintiffs are entitled to continue their discovery before this claim is foreclosed. The Union's motion for summary judgment will, therefore, be denied as to the plaintiffs' claim that the Union aided and abetted in the commission of section 186 violations.

e. Conspiracy.

Under RICO, a defendant need not personally commit the predicate acts provided the evidence is sufficient to connect him to the fraudulent scheme. *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 115 (5th Cir. 1987). To support a RICO conspiracy charge under 18 U.S.C. 1962(d), the plaintiffs need not prove the Union could be guilty as a principal for the racketeering activity, but that the Union conspired to commit the substantive RICO offense and was aware that others had done likewise. *United States v. Norton*, 687 F.2d 1354, 1359 (11th Cir. 1989). To establish a conspiracy to violate RICO, the plaintiffs must prove the Union, by its words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of the enterprise, through a pattern of racketeering activity. *United States v. Fernandez*, 797 F.2d 943, 950 (11th Cir. 1986), *citing United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980). A pattern requires at least two acts of racketeering activity. *Id.* The plaintiffs must present proof that the Union, by word or deed, agreed to commit the two predicate acts necessary to form the basis of the RICO charges. *Id.* Evidence of a person's efforts to assist in the concealment of a

conspiracy may support an inference that he joined it while it was still in operation. *United States v. Gold*, 743 F.2d 800, 825 (11th Cir. 1984). Mere knowledge, approval or acquiescence in another's crime does not make one a co-conspirator. The Union argues it is entitled to summary judgment on plaintiffs' conspiracy claim because it is not vicariously liable for the negotiators' actions since it is a victim enterprise. As noted above, the Union has cited no support in the record for its claim that it is a victim enterprise. *Coats & Clark*, 929 F.2d at 608. Furthermore, plaintiffs have once again pointed to the *Thrasher* answer, the *Sommerville* affidavit, and Kleiman's conversations with Thrasher as support for their claim that the Union was a co-conspirator. A jury could reasonably infer that the Union joined in while the conspiracy was still in operation from evidence that the Union attempted to cover up the conspiracy. *Gold*, 743 F.2d at 825. Until plaintiffs complete their discovery, the Union is not entitled to summary judgment on the basis that it did not conspire with USX and the Fund.

4. The Injury.

In addition to claiming it is not liable for the negotiators' actions, the Union argues the plaintiffs have no evidence they were injured in their business or property by the alleged racketeering activity. 18 U.S.C. § 1964(c). Causation is an essential element of a RICO action. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *petition for cert. filed* (October 15, 1991).

> A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money. He must show a causal connection between his injury and a predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act.

Pelletier v. Zweifel, 921 F.2d 1465, 1497 (11th Cir. 1991).

> Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere

> commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured."

Sedima, S.P.R.L. v IMREX Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), *citing Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384-398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). The plaintiff's injury must have been proximately caused by the commission of the predicate acts. *Pelletier*, 921 F.2d at 1499. The Eleventh Circuit has taken the more restrictive view of the proximate cause requirement, holding that a plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts. *Id.*

There is a substantial amount of evidence in the record tending to prove that the concessions in the FWA were caused by the economics of the steel industry in 1983.[46] The Union points to evidence in the record that: (1) at the time of the negotiations, the Fairfield Works had been shut down for more than a year because USX had been losing money in operating the plant (USWE 189-

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[46] The Union and USX argue the concessionary Fairfield Works Agreement did not injure plaintiffs because it was the vehicle for reopening the Works and returning the plaintiffs to their employment. The agreement did, however, include a considerable number of concessions by the Union. Plaintiffs' return to work under less favorable conditions constituted an injury to their business or property sufficient to satisfy RICO requirements, if plaintiffs could show they would have returned to work under a less concessionary agreement absent the RICO violations. However, as discussed below, plaintiffs have produced no evidence of a causal connection between the concessions and the predicate acts.

90, 257-58, 269-73, 355-59, 480-96, 537-38); (2) the Company decided and informed the Union negotiators that concessions and changes in operations were necessary to reopen the Fairfield Works (USWE 259-60, 292-97, 336-38, 352-59, 365-66, 497-501, 514-15, 531-36); (3) USX negotiators and officials thought Rich and Phillips bargained well on behalf of the Union (USWE 280, 339-42, 365-68, 428-29, 532); (4) the final agreement was more favorable for the Fairfield workers than the Company originally had been prepared to accept (USWE 274, 339-41, 365-66, 421-23, 428, 505-06, 509-10, 530, 542-43); (5) under the agreement, many workers were offered either a job or a special early pension, and USX agreed to make capital investments to modernize the plant (USWE 193-94, 196, 202-04, 206-07, 282-83, 421-23, 471-75); (6) the Union negotiators were told if an agreement was not reached Fairfield would be among the plants USX closed permanently on December 27, 1983 (USWE 440, 444-45, 449, 453-54, 536-37); (7) on December 1, 1983, USX sent a letter to each bargaining unit employee at Fairfield warning that permanent closure of the plant was imminent if the Union would not agree to concessions (USWE 119-22); (8) three days after the Fairfield Agreement was signed, USX finally closed twenty to thirty steel making facilities (USWE 125-28, 281, 369, 418-19, 502-04, 506-08, 538, 546); (1) Fairfield was a candidate for permanent closure during USX's 1983 restructuring of its Steel Division (USWE 195, 261, 271-72, 355-56, 358, 361-63, 367-71, 419, 431-32, 511-12, 516-17, 546); (1) USX continued to lose money at Fairfield after the plant reopened (USWE 278-79, 370); (11) discussion of the leaves of absence and pension credits was not a significant point in the negotiations, a total of twenty to twenty five minutes were spent discussing the leaves of absence and pension credits during the three months of the Fairfield negotiations (USWE 310-11, 317-18, 321-26, 452, 469-70); (12) the Company and Union negotiators did not consider the matter part of the Fairfield negotiations (USWE 310-18, 321-23, 326-29, 332-33, 401-02, 420, 430, 446-

47, 450-51, 519-20, 543-44); (13) the Company negotiator, Miller, and the Union negotiator, Rich, testified Phillips and Rich never offered to give anything in exchange for the pension benefits, did not make any terms of agreement conditional on pension benefits, and did not trade anything for them (USWE 416-17, 420, 424, 430, 476-77); (14) on the final day of negotiations, December 24, 1983, the agreement was in final form before the Union negotiators again raised the issue of the pensions (USWE 298-302, 330-34, 341-42, 403-13, 455-63, 539-42); (15) the Company negotiators told Rich they would not deal with the pension matter in connection with the Fairfield negotiations, but would "consider" it at a later date if it were raised by the International Union (USWE 275-77, 302-08, 415-16, 466-67); and (17) the negotiators testified that the terms of the agreement were not affected by the promise to consider the pension issue (USWE 416-17, 420, 425-26, 430, 468-69).

Plaintiffs did not point to any evidence conflicting with the Union's evidence, but argue: (1) the jury could infer from the evidence that the defendants' conduct created a conflict of interest which subverted the loyalty of the negotiators, and plaintiffs had a property interest in their right to the honest and faithful services of the Union negotiators; (2) the jury could infer from the evidence that USX expected to receive and did receive a *quid pro quo* for the leaves of absence and pension benefits given to the Union negotiators; (3) the jury could infer from the evidence that the concessions in the Fairfield Works Agreement were proximately caused by the predicate acts; and (4) the jury could infer from the evidence that the agreement would have been better but for the Union negotiators' conflict of interest.

The drawing of inferences from the facts is the function of the jury, and therefore all reasonable inferences are to be drawn in the favor of the party opposing summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 255. However, the nonmovant need not be given the benefit of every inference, but only of every

reasonable inference. *Brown v. City of Clewiston*, 848 F.2d at 1540 n. 12. Summary judgment is proper where the inferences the nonmoving party presses are not plausible. *Id.*

Plaintiffs first argue the jury could infer from the defendant's conduct that they were injured by a conflict of interest which subverted the loyalty of the Union negotiators. They claim the Union negotiators' request for pensions and the Company's payment of pension created a conflict of interest for the Union negotiators which injured a property interest in their right to the honest and faithful services of Union officials.[47]

Plaintiffs have never before advanced this theory of injury. In the pretrial order entered by Judge Guin on November 2, 1989, plaintiffs claimed the Union negotiators agreed to concessions in the Fairfield Works Agreement in return for the leaves of absence and pension benefits and "as a direct result of the concessions made by the Union in the negotiations of the December 24, 1983 Fairfield Works Agreement, plaintiffs lost jobs, compensation, and other employee benefits, and a number of pending grievance and arbitration proceedings were dismissed." Order of Hon. J. Foy Guin, Jr., entered November 2, 1989. In their First Amended (And Substituted) Complaint, the plaintiffs claimed they were injured by the concessions in the FWA. Complaint of February 28, 1989, para. 72, 73. The plaintiffs have since amended their complaint, but did not add allegations that they were injured by the loss of the honest and faithful services of the Union negotiators. Plaintiffs' Second Amended Complaint, filed January 8, 1991. Plaintiffs cannot

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[47] In *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267 (3rd Cir. 1985), the Third Circuit concluded that Union members have protectible property interests in their rights incident to Union membership. *Id.* at 281-82. The Union has not challenged that holding, but argues that denial of such intangible rights is not the sort of injury to "business or property" that triggers standing under 18 U.S.C. § 1964.

escape the binding effect of the pretrial order by raising new issues in a response to the defendants' motion for summary judgment. *Beavers v. American Cast Iron Pipe Co.* 751 F.Supp. 956, 964, n. 7 (N.D. Ala. 1990).

Additionally, the Union argues the alleged injury, denial of plaintiffs' right to the "honest and faithful services of Union officials," is not the sort of injury to business or property RICO was intended to remedy. RICO's civil action provision, 18 U.S.C. § 1964(c), was patterned after the Clayton Act, 15 U.S.C. § 15, and cases interpreting the meaning of "business or property" in the Clayton Act context are applicable in the context of RICO's civil action provision. *See, Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150-51, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103 (2nd Cir. 1990). RICO and the Clayton Act "aim to compensate the same type of injury; each requires that a plaintiff show injury `in his business or property by reason of' a violation." *Malley-Duff*, 483 U.S. at 151 (citations omitted). In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), the Supreme Court noted that "[o]n its face, § 4 [of the Clayton Act] contains little in the way of restrictive language." *Reiter*, 4452 U.S. at 337. The *Reiter* court rejected the argument that the section 4 remedy was available only to redress injury to commercial interests. In that case, the court afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer had standing to seek a section 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). In *McCready*, the court noted that ". . . while `difficulty of ascertainment [should not be] confused with right of recovery,' . . . § 4 [of the Clayton Act] plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at the bottom on some abstract conception or speculative measure

of harm." *McCready*, 457 U.S. at 475, n. 11. Plaintiffs have cited no case in which the alleged RICO injury was found to consist of damage to an intangible property interest in "honest and faithful" services such as they claim here. In view of the requirement that plaintiffs suing under the Clayton Act must prove a "tangible economic injury," and the recognition that RICO's civil remedy provision is patterned after the Clayton Act, the court finds that plaintiffs' claimed deprivation of the "honest and faithful services of Union officials" is not the sort of inquiry to business or property RICO was intended to remedy.

Second, plaintiffs argue the jury could infer that USX expected to receive something in return for the pension benefits given to the Union negotiators. Plaintiffs claim that Rich and Phillips implemented the FWA and were involved in grievance and arbitration proceedings which arose at the Fairfield Works.[48] Because Rich and Phillips were influential at Fairfield, plaintiffs argue, the jury could infer that USX gained the Union's cooperation in the implementation and administration of the FWA when it paid pensions to the Union negotiators. However, the plaintiffs have presented no evidence that Rich and Phillip's actions in connection with implementing the FWA were influenced by their relationship with USX or that Rich and Phillips implemented the FWA so as to injure plaintiffs. Plaintiffs have claimed and attempted to prove that they were injured by concessions made in the FWA, not by the implementation of the FWA. Plaintiffs must have evidence of an injury flowing directly from the commission of the predicate acts, and they have no evidence that they were injured by Rich and Phillips' imple-

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[48] As noted above, plaintiffs have presented no evidence that Rich and Phillips were involved in grievance and arbitration proceedings, they have established only that the Fairfield Plant Manager, Stevenson, dealt with Rich and Phillips with regard to "local issues." Mr. Stevenson did not define what he meant by the term "local issues." (PA 232-36, 405-06). The Union has not, however, disputed plaintiffs' characterization of Rich and Phillips' role at Fairfield.

mentation of the FWA because they were receiving pensions from USX in violation of section 186. Plaintiffs cannot satisfy their burden of proving causation by proving racketeering activity and claiming that there *must have been* an injury therefrom.[49]

[49] Plaintiffs quote from *Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942), in support of their claim that the jury could infer USX received something in return for the payment of pension benefits to the Union negotiators. In *Kemler*, the court had evidence before it that the defendant offered to pay a Selective Service examining physician if the physician would certify that defendant's heart was weak. The defendant argued that he would have been legally justified in not presenting himself for physical examination because he had not been reclassified as 1-A. The court said the gravamen of the offense was the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct and "no one would give or offer a bribe unless he expected to gain some advantage thereby," so that it made no difference if the doer discovers later that there was no occasion for him to have done it. Plaintiffs here are not trying to prove intent to influence, but an injury. It is one thing to infer from the offer of a bribe that the offerer had an intent to influence; it is quite another to infer that he did, in fact, succeed in influencing the conduct of the recipient and that the conduct of the recipient injured the plaintiffs.

Neither does *Continental Management, Inc. v. United States*, 527 F.2d 613, 618-19 (Ct. Cl. 1975), help the plaintiffs. In *Continental*, the government claimed a third party who had bribed government VA and FHA employees was liable to the government for the amount of the bribes. The government could prove injury caused by the bribery, including, *inter alia*, the generalized injury of diminution of the public confidence, and specific injuries such as payment to an employee to "assign the 'right appraiser'" and payment to a government employee for "help on escrow problems." *Continental*, 527 F.2d at 618. Since the government could not prove the amount of damages, the court found the amount of the bribe provided a reasonable measure of damage, citing *Kemler* for the proposition that the offer of a bribe expects to get something in return. *Continental* is inapposite since the plaintiff there had proved injury caused by the bribe, and the only question before the court was the amount of damage. Additionally, the damages in *Continental* were the amount of the bribe only, not the treble RICO damages sought by plaintiffs here. Plaintiffs cannot satisfy their burden of proving the RICO violation caused their injury merely upon proof of the RICO violation, in view of the requirement that they prove both racketeering activity and causation. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).

Third, plaintiffs contend the jury could infer from the evidence that the concessions in the FWA were proximately caused by the section 1962 violations. (Plaintiffs' Brief, pp. 26-32). Plaintiffs point to evidence that: (1) the leaves of absence issue was discussed secretly; (2) Rich gave Miller the request for leaves of absence early in the negotiations; (3) in an October 27 meeting, Rich said the pensions were a "condition of settlement"; (4) Miller told Roderick, Graham and Johnston in December 1983 that the pension issue was an "open item"; (5) on December 24, 1983, Rich and Phillips refused to sign the "completed typed FWA" until they had their answer on the pensions; (6) the pensions were kept confidential within USX; (7) upon Rich and Phillips' refusal to sign, Miller called Johnston and obtained a specific and detailed outline of the conditions under which the Company would consider granting the leaves of absence and pensions; (8) Rich and Phillips did not sign the FWA until after Miller told them he was of the impression that USX would favorably consider their request; (9) Johnston wrote a July 1984 memo to Miller, in which he asked "are we in jeopardy of losing our momentum with E.B. and Thermon," and Miller's responded that USX's handling of the pension request was the "thing they have their eye on"; (10) the leaves of absence policy adopted by the Corporate Policy Committee on October 22, 1984 were made retroactive to March 1, 1984, because "a commitment was made" that the pensions would start then, according to Short; and (11) the stated purpose for the policy was to promote the goodwill of former employees who worked for the Union.

Considering this evidence in the light most favorable to the plaintiffs, the jury could find the pension issue was the subject of secret discussions several times during the FWA negotiations and that Rich considered the pensions a condition of settlement, but USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign. There is also some evidence from which the jury could infer that USX "committed" to

providing the pensions, and that USX intended to influence Rich and Phillips in some manner.

There is no indication or evidence that the negotiators on either side were swayed by their outstanding request for pensions while they negotiated the terms of the agreement. In light of the undisputed evidence that the FWA was never changed after USX promised to consider the pension issue, the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA.[50]

More importantly in view of the additional undisputed evidence that the concessions resulted from the need to make the Fairfield Works profitable before it was reopened, the jury could not soundly infer that it was more likely that the concessions resulted from the bribery of Union officials than from economic necessity.[51] From the evidence plaintiffs presented, a jury could

[50] Plaintiffs have not disputed the defendant's claim that the agreement was not changed after Rich and Phillips made their demand for pensions on the final day of negotiations. Plaintiffs have a pending motion requesting that the court stay disposition of the summary judgment motions pending resolution of the interlocutory appeals of discovery issues presently before the Eleventh Circuit. As the court noted earlier in this opinion, the court has considered plaintiffs' lack of discovery where the plaintiffs have specifically demonstrated that further discovery might lead to evidence which would preclude summary judgment. However, plaintiffs have not claimed they might find evidence that the FWA was changed in response to Rich and Phillips' demand, nor have they argued that the outstanding discovery might provide them with information which would lead to evidence of causation. In view of the extensive discovery plaintiffs have already obtained, and their failure to specify that further discovery would lead to evidence which would preclude summary judgment based on causation, the court finds summary judgment on this question proper. *See, e.g. Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991).

[51] On proof of causation, *Prosser and Keeton on Torts* provides:

> The Plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the

(Footnote 51 continued on next page)

only speculate about USX's motives in giving pension to Union officials. There is no evidence from which the jury could conclude USX obtained the FWA concessions as a result of paying Union officials pensions. Plaintiffs' invitation to assume that the concessions must have been the result of bribery is not sufficient where the concessions could just as likely have resulted from the need to make Fairfield economically viable. Again, plaintiffs ask the court to find that the proof of an act of racketeering and an injury is sufficient to establish their *prima facie* case. There must be some substantial evidence of a causal connection between the predicate act and the injury. *Pelletier*, 921 F.2d at 1497. There is none here.

Plaintiffs also argue the jury could infer that the FWA would have been more beneficial for them absent the Union negotiators' conflict of interest, citing *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 543, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943). In *Virginia Electric*, the Supreme Court was reviewing a decision of the N.L.R.B. ordering a company to reimburse the dues its employees were required to pay to a company-dominated union. The court, considering the argument that the company-dominated union had produced some benefits for the employees, upheld the Board's decision, noting it was "manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." *Id.* at 544. However, the court specifically noted the Board's reimbursement order was not a redress for a

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(Footnote 51 continued)

> defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on Torts, § 41, p. 269 (5th ed. 1984).

private wrong, but a remedy created by statute. *Id.* at 543. The court therefore noted it was "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained." *Id.* Plaintiffs here have no such relief from the common law requirements, and, again, they have the burden of proving the RICO violation caused their injury. *Avirgan*, 932 F.2d 1572. Causation is a separate and distinct element of a *prima facie* RICO case. *Avirgan*, 932 F.2d at 1577.

Because plaintiffs do not have evidence that their injury was caused by the RICO violations, the Union is entitled to summary judgment on Count I of plaintiffs' complaint.

B. The Company and the Fund.

The Company and the Fund (hereinafter "USX") filed their motion for summary judgment claiming, as to plaintiffs' RICO counts, that plaintiffs cannot demonstrate an injury proximately caused by racketeering activity, and that plaintiffs cannot demonstrate a "pattern" of racketeering injury.[52]

1. Pattern of Racketeering Activity.

USX argues plaintiffs have no proof defendants engaged in a pattern of racketeering activity. It points out that plaintiffs have alleged violations of section 186 as predicate acts, and claims the only evidence of section 186 violations are USX's promise to give Union negotiators leaves of absence with attendant pension benefits and the actual payment of the pension benefits. Proof of a "pattern of racketeering activity" requires a showing of at least

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[52] Like the Union, USX argues that it cannot be both the "enterprise" and the defendant under 18 U.S.C. § 1962(c). As noted above, this court will follow existing Eleventh Circuit precedent and hold, therefore, that the enterprise and the defendant may be one and the same under Section 1962(c). *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982).

two predicate acts within a ten year period. 18 U.S.C. § 1961(5). While two predicate acts are necessary they may not be sufficient, since two of anything do not generally form a "pattern." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

Sedima, 473 U.S. at 496, n. 14 (emphasis in original). The element of relatedness is satisfied upon proof that the criminal acts have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239-40, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Proof of relatedness is not sufficient to establish a pattern, however; plaintiffs must also show a continuity of racketeering activity, or its threat. *H.J. Inc.*, 492 U.S. at 421. Continuity refers either to a closed period of repeated conduct, or to past conduct that by its nature projects a threat of repetition in the future. *Id., Bivens Gardens Office Bldg. Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1555 (11th Cir. 1990). "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242. Where a RICO action is brought before continuity can be established, liability depends on whether the threat of continuity is demonstrated. *Id.* Proof that a defendant has been involved in multiple criminal schemes would be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, but continuity need not be shown only by proof of multiple schemes. *H.J. Inc.*, 492 U.S. at 240.

The defendants contend that the alleged bribe was a discrete act which occurred sometime during the 1983 negotiations of the FWA, a "single-shot, uncomplicated, `garden-variety' bribe." USX's Memorandum in Support of Summary Judgment, dated January 15, 1991,p.14. Plaintiffs argue they have established a pattern of racketeering injury with proof that: (1) the "negotiations regarding the Fairfield Works Agreement did not conclude until November 1984"; (2) Rich and Phillips implemented and interpreted the FWA and processed grievances and arbitrations, while they were "on the Company's payroll"; and (3) the monthly payments continued from December 1984 until May 1988.

The FWA negotiations commenced on or about July 1, 1983, and were completed on December 24, 1983. There is no support in the record for plaintiffs' claim that negotiations continued after the agreement was signed on December 24, 1983.[53]

Plaintiffs accuse Rich and Phillips of being "on the Company's payroll" while the FWA was implemented without articulating any theory of how this evidence shows further section 186 violations. Plaintiffs have not pointed to any evidence of improprieties in the implementation and interpretation of the FWA, or to evidence of improper handling of grievances or arbitration proceedings. Plaintiffs must present evidence that defendants committed sufficient section 186 violations to satisfy the RICO "pattern" requirement. Proof that Rich and Phillips implemented the FWA does not show USX committed further section 186 violations. If plaintiffs had presented evidence that Rich and Phillips wrongfully implemented the FWA to favor USX, a jury could infer therefrom that the pension payments were separate bribe payments. There is, however, no evidence of wrongdoing in connection with the implementation of the

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[53] As noted above, the only evidence plaintiffs cite in support of this claim is testimony about the procedure for implementing the early retirements made available under the FWA.

FWA. Plaintiffs must show at least two related racketeering predicate acts that amount to, or threaten the likelihood of, continued criminal activity. *United States v. Alexander*, 888 F.2d 777, 778, (11th Cir. 1989).

Finally, plaintiffs argue that the mailing of monthly payments under the pension plan from December 1984 through May 1988 satisfied the RICO pattern requirement. Acts that are part of the same scheme or transaction can qualify as distinct predicate acts. *H.C. Inc.*, 492 U.S. 229 (1989); *Bank of America Nat'l Trust and Savings Ass'n v. Touche Ross and Co.*, 782 F.2d 966 (11th Cir. 1986). If separate statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose. *U.S. v. Gonzalez*, 921 F.2d 1530, 1545 (11th Cir. 1991).

The plaintiffs contend the monthly mailings of pension benefits each constituted a separate violation of 29 U.S.C. § 186.[54] USX claims that the monthly payments made by the Fund were non-discretionary "ministerial acts" which were compelled by ERISA once the pensions were granted, and that the payments were nothing more than parts of one transaction, indistinguishable from installments of a lump sum amount. USX's Brief, at

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[54] Under 18 U.S.C. § 1961(1)(b), racketeering activity is "any act which is indictable" under various criminal statutes. In their complaint, plaintiffs allege the mailings were separate violations of 29 U.S.C. § 186. (Plaintiffs' Complaint, para. 78). Until this summary judgment motion, plaintiffs had not claimed the mailings were violations of the mail fraud statute. Amendment of pleadings to conform to the evidence should be liberally allowed, Fed.R.Civ.P. 15(b), and proof of uncharged acts are admissible to prove membership in the RICO conspiracy, *U.S. v. Gonzalez*, 921 F.2d 1530, 1546-47 (11th Cir. 1991). However, plaintiffs have merely made the allegation that the mailings amounted to mail fraud; they have not presented any evidence in support of that claim. Neither have they alleged or proved that they were injured in their business or property by reliance on a mail fraud scheme. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991).

16-17,[55] In *United States v. Boffa*, 688 F.2d 919, 934-36 (3rd Cir. 1982), the Third Circuit held that a reasonable jury could find that each of four monthly lease payments, every payment allowing a union official free use of a car for a month, was a violation of section 186. *Boffa*, 688 F.2d at 934.[56] In determining what "thing of value" was given to union officials, the focus must be on what was delivered, and not what was received. *Boffa*, 688 F.2d at 935.[57] Individual payments made pursuant to a single agreement are separate violations. *United States v. Cohen*, 384 F.2d 699 (2nd Cir. 1967). Each payment is a violation of the statute even where it is part of a single course of conduct. *United States v. Donovan*, 339 F.2d 404, 410 (7th Cir. 1964). However, in *Boffa*, the court acknowledged that the jury had to find that each lease payment constituted a "thing of value" before it could conclude the defendants had violated the statute more than once. *Boffa*, 688 F.2d at 936. Proof that the payments were "parts of one transaction, installments of a pre-arranged amount, or the result of a single impulse" would be relevant to the determination of whether the individual pension payments were "things of value." *Donovan*, 339 F.2d at 410. The jury must determine

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[55] USX also quotes from the "RICO manual" of the Department of Justice. USX Brief at 17. Although the court was not provided a copy of the manual, the portions quoted purport to require that United States prosecutors allege more than one criminal episode, and, in a bribery case, have evidence that all payments represent individual, separate transactions rather than installments of an agreed-upon overall bribe. *Id.*

[56] *United States v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990), does not support plaintiffs' claim. The *O'Connor* court had before it evidence that O'Connor provided continuous services in return for continuous payments. There is no evidence here that Rich and Phillips provided USX with services after the FWA was signed. As noted above, plaintiffs have claimed Rich and Phillips implemented the FWA, but made no claim that the FWA was wrongfully implemented in USX's favor.

[57] Indirect payments, such as payments made through a non-employer corporate instrumentality, are within the prohibition of the statute. *United States v. Overton*, 470 F.2d 761, 765 (2nd Cir. 1972).

whether the "thing of value" delivered by USX was a pension, or separate monthly pension payments, *Boffa* 688 F.2d at 936, and the court cannot properly make that decision on summary judgment.

However, USX argues that even if each payment was a separate violation of section 186 they do not satisfy the pattern requirement after *H.J. Inc.* Proof that a number of predicate acts occurred over a period of time is not, by itself, sufficient to show a pattern of racketeering activity. A "pattern" is more than just a multiplicity of racketeering predicates; it is an "'arrangement or order of things or activity.'" *H.J.Inc.*, 492 U.S. at 238. Plaintiffs must show the acts are related one to another and that they amount to, or otherwise constitute a threat of, continuing racketeering activity. *H.J.Inc.*, 492 U.S. at 237-40, *United States v. Kotvas*, 941 F.2d 1141, 1144 (11th Cir. 1991). "Continuity" refers either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition. *H.J.Inc.*, 492 U.S. at 241. "[P]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* 492 U.S. at 242. RICO's language should be given its "common sense, every day" meaning. *H.J. Inc.*, 492 U.S. at 241.

Under post-*H.J., Inc.* Eleventh Circuit law, distinct statutory violations are considered to be distinct predicate acts, irrespective of the circumstances under which they arose. *Gonzalez*, 921 F.2d at 1545. Therefore, if the jury should determine that the payments constituted separate violations of section 196, each payment would be a "predicate act" for RICO purposes. In *United states v. Kotvas*, the Eleventh Circuit held the element of continuity was sufficiently addressed where the jury was instructed that it had to find defendant committed two *predicate offenses* which were "connected with each other by some common scheme, plan or motive so as to be a pattern of criminal

activity and not merely a series of separate isolated or disconnected acts." *Id.* at 1144. The court specifically found the instruction addressed the *H.J. Inc.* "continuity" element. *Id.* A jury could find from the evidence presented here that the payments were individual violations of section 186 and were connected by a common scheme, plan, or motive. That is all the Eleventh Circuit requires the plaintiff to prove in establishing "continuity" after *H.J. Inc. Kotvas,* 941 F.2d at 1144.[58]

Furthermore, there is other evidence of a pattern of racketeering activity in the record which plaintiffs have not relied upon, but which the court must consider. There is evidence tending to show: (1) USX did not rebuff the Union negotiators when they requested pensions during the negotiations, and they thereafter took steps to examine the possibility of granting the pensions (PA 100a-100h, 169-171); (2) on December 24, 1983, USX promised to "favorably consider" the pension request under certain specified conditions which had been outlined by Bruce Johnston (PA 101-104); (3) USX committed to giving the Union officials pensions retroactive to February 29, 1984 (PA 420, 323, 3240; (4) USX changed its leave of absence policy on October 22, 1984, making it possible for some Union officials to receive leaves of absence (PA 421-22, 425); (5) USX approved requests for leaves for six Union representatives at Fairfield (PA 436); (6) On September 27, 1984, USX's executive Vice President, Employee Relations, J. Bruce Johnston, recommended the six Fairfield Union officials receive pensions from the Fund "in accord with the December 24, 1983 agreement between the Company and the USW at Fairfield Works" and E.B. Rich was, on October 23, 1984, invited to submit a "final list of names" of

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[58] USX has cited several cases from the Seventh and Third Circuits in support of its argument that the plaintiffs have not presented evidence of a pattern of racketeering activity. The Eleventh Circuit has not directly addressed these arguments, but it has, in *Kotvas,* defined a significantly more relaxed view of the post-*H.J.* pattern element.

those who desired pensions (PA 305, 308); (7) in November 1984, the Fund gave pensions to the Fairfield Union officials (PA 300-02, 330-32, 340-41, 353-54, 372, 3760; and (8) in addition to pensions, the Union officials received health insurance and life insurance. (PA 300, 302, 330, 332, 340, 342, 353, 354, 376). From this evidence, a jury could find a number of violations of section 186 extending over an eleven month period.[59] Although the evidence conflicts, plaintiffs have presented some evidence that USX agreed to pay the Union negotiators pensions as early as December 24, 1983. PA 305, 308. If USX had not arranged for the Union officials to receive pensions, the mere agreement to give the Union officials pensions would have been a violation of section 186. 29 U.S.C. § 186(a). The jury may also find USX violated section 186 when it approved the leaves of absence for the six Fairfield union officials, when it recommended the six officials receive pensions from the Fund, or when the Fund gave the union officials life and health insurance. Each of those actions could be found by a reasonable jury to be a "thing of value" which USX agreed to give or gave to the union officials. 29 U.S.C. § 186; *See United States v. Cervone*, 907 F.2d 332, 347 (2nd Cir. 1990) (statute's language indicates a tangible item or valuable services or entitlements). The statute condemns the agreement and "likewise makes each receipt or acceptance a separate crime." *United States v. Cohen*, 384 F.2d 699, 700 (2nd Cir. 1967).

2. Injury.

USX also claims the plaintiffs suffered no injury from the concessions in the FWA because plaintiffs would not have been

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[59] In *H.J. Inc.*, the Supreme Court said a plaintiff may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time; predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirements. *Id.*, 492 U.S. at 242. A reasonable jury could find that USX engaged in a pattern of racketeering activity under this formulation.

able to go back to work but for the FWA. As discussed above, defendants have presented considerable evidence showing the concessions were necessary due to the economic crisis in the steel industry. Plaintiffs reply that the gave up a number of concessions when they went back to work under the FWA, but they have not presented any coherent response to USX's argument that they were not injured because they got their jobs back under the agreement. However, if one assumes the plaintiffs were injured because they went to work under less favorable conditions than they otherwise might have had, plaintiffs still lack proof that the concessions were caused by the bribery of Union officials. As discussed above, plaintiffs have not presented evidence supporting their claim that the concessions in the FWA were proximately caused by the bribery of Union officials, and USX and the Fund are, like the Union, entitled to summary judgment on all of plaintiffs' RICO claims.

USX also argues that plaintiffs' RICO claims under § 1962 (a) and (b) are defective because plaintiffs have no proof of an "investment injury' under 1962(a) or a "control injury" under 1962(b). USX claims plaintiffs must show they were injured by the investment of money in the enterprise under 1962(a), rather than by the pattern of racketeering activity. Similarly, under 1962(b), USX claims plaintiffs must show they were injured by the defendants' acquisition or maintenance of the enterprise rather than by the pattern of racketeering activity.

The court agrees with the Fourth Circuit's holding on this issue in *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), and finds that the plaintiff need not show an "investment injury" or a "control injury." Plaintiffs need only show an injury to business or property flowing from the commission of the predicate acts. Particularly, under section 1962(a), there appears to be no basis in the statutory language for finding the defendant's conduct can injure the plaintiff only through the use and investment of racketeering income rather than by the receipt of the

income. *Busby,* 896 F.2d at 837. Furthermore, the Supreme Court's broad language in *Sedima,* 473 U.S. 479 (1985) and *American Nat'l Bank & trust Co. v. Haroco, Inc.,* 473 U.S. 606, 205 S.Ct. 3291, 87 L.Ed.2d 437 (1985) appears to foreclose the defendants' argument. As the *Busby* court noted, although the complaints in *Sedima* and *Haroco* were filed under 1962(c), the cases appear to require a traditional causation analysis in determining whether a RICO plaintiff was injured "by reason of" a section 1962 violation, and they make no distinction between the underlying section 1962 violations. *Busby,* 896 F.2d at 839. Finally, in *Pelletier v. Zweifel,* 921 F.2d 1465 (11th Cir. 1991), the Eleventh Circuit required proof that the plaintiff's injury flowed from the commission of the predicate acts, and made no distinction between the plaintiff's claims under section 1962(c) and his claims under section 1962(a) and (b). *Pelletier,* 921 F.2d at 1495-1499. Although the *Pelletier* court was not directly addressing this issue, the court's application of the *Sedima* causation analysis to the section 1962(a) and (b) claims indicates the Eleventh Circuit would agree with *Busby,* and find that *Sedima's* traditional causation analysis applies, regardless of which section 1962 violation plaintiff alleges.

USX also argues there is no evidence it invested income derived from the bribe in the Fund, the Union, or District 36 of the Union. USX claims the only other alleged enterprise, the Fairfield Works, does not meet the definition of a RICO "enterprise" as set out in 18 U.S.C. § 1961(4).[60] USX claims Fairfield is merely a "plant" or collection of "facilities" or assets, and it argues that such an "inanimate object" cannot constitute a

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[60] That subsection provides:

> '[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4).

RICO enterprise. Fairly considered, Fairfield Works is more than buildings and assets, it is an ongoing business venture. There is sufficient evidence of record from which a jury could find that Fairfield, although not a legal entity, is a group of individuals "associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Proof of a formal or informal ongoing organization and evidence that the various associates function as a continuing unit satisfies RICO's enterprise element. *United States v. Hartley,* 678 F.2d 961, 988 (11th Cir. 1982) (*quoting United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).

In summary, defendants are entitled to summary judgment as to plaintiffs' RICO claims because plaintiffs lack proof that they suffered injury to their business or property caused by the RICO predicate acts.

V. The "Hybrid" Section 301 Claim.

In Count II of their complaint, plaintiffs assert a claim against the Union for breach of its duty of fair representation and a claim against USX for breach of contract, a hybrid section 301 claim.[61] 29 U.S.C. § 195(a). Plaintiffs claim USX breached the March 1, 1983, Basic Labor Agreement and the February 1, 1987, Basic Labor Agreement by entering into the December 24, 1983, FWA

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[61] As noted above, a straightforward section 301 claim involves a union suing an employer for breach of a collective bargaining agreement. In a hybrid section 301 claim, the union member sues his employer for breach of the collective bargaining agreement and contends the union breached its duty of fair representation. *United Paperworks Int'l v. Itt Rayonier,* 931 F.2d at 834 n. 7. To bring a straightforward section 301 claim for breach of contract against his employer, a union member is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. The union member my bring a hybrid section 301 suit notwithstanding the outcome or finality of grievance or arbitration proceedings, but must show not only that the company breached the contract, but that the union breached its duty of fair representation. *Del Costello,* 462 U.S. at 164-65.

and that the Union breached its duty of fair representation "in connection with" the FWA negotiations.

Defendants argue plaintiffs' claim is foreclosed by the applicable statute of limitations. Hybrid section 301 claims are governed by the six-month statute of limitation set out in section 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b). *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

This action was commenced on December 7, 1988. The FWA was signed on December 24, 1983. The Union claims the six month period must run from the date the FWA was signed since the gravamen of plaintiffs' complaint is that the contract was illegally executed. In *International Ass'n of Machinists, Local No. 1424 v. NLRB,* 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (196), the Supreme Court said where a union committed an unfair labor practice in signing a collective bargaining agreement, the section 10(b) limitations period ran from the date the contract was signed, and a continuing violation theory would not be applied to provide that subsequent enforcement of the otherwise valid contract would bring the violation within the limitation period. The court noted that if a continuing violation theory were applied, as long as the contract or any renewal were in effect, the six month period would not begin to run. The result would be to withdraw "virtually all limitation protection from collective bargaining agreements" attacked on the grounds that the contract was executed in violation of the law. *Id.,* 362 U.S. at 425. The *Local 1424* court was not concerned with application of a discovery rule to the section 10(b) period.

The Eleventh Circuit has consistently applied a discovery rule to the section 10(b) limitation period where the alleged violation occurred during a grievance procedure. *See, e.g., Proudfoot v. Seafarer's International Union,* 779 F.2d 1558 (11th Cir. 1986). The Seventh Circuit applies the discovery rule to the section 10(b) limitation period when the violation occurs during nego-

tiations. *Zapp v. United Transportation Union*, 879 F.2d 1439 (7th Cir. 1989). In view of the Eleventh Circuit's consistent application of the discovery rule to the section 10(b) limitation period in cases involving violations occurring during grievance proceedings, the court concludes the Eleventh Circuit would, like the Seventh Circuit, apply the rule in cases involving violations occurring during negotiations. *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1106 (2nd Cir. 1991) (limitations period began to run, at the latest, as of the date the allegedly violative agreement was ratified, by which time the plaintiffs had already begun working under the agreement and were aware of the terms of the agreement); *and see Bowen v. City of New York*, 476 U.S. 467, 480-81, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) (though social security benefit claimants knew of the denial of benefits, they did not know and could not know the adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge).

Thus, in the absence of fraud or concealment, the six-month limitations period starts running when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation. *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984). The court must look to the point in time when plaintiffs either were aware or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations. *Id.* The issue is normally a question of fact, although in certain instances the issue can be resolved on a motion for summary judgment. *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1075 (11th Cir. 1986). The timeliness of a hybrid section 301 suit must be measured from the date on which the employee knew or should have known of the employer's final action, whichever occurs later. *Proudfoot v. Seafarer's International Union*, 779 F.2d 1558 (11th Cir. 1986). In this action, the plaintiffs could not have known they had a legally cognizable injury until they discovered

or should have discovered that the concessions in the FWA may have been the result of bribery of the Union negotiators.[62] It was not enough, as the Union suggests, that they knew the terms of the agreement at an earlier date. The period begins running when the plaintiff discovered or should have discovered the acts constituting the alleged violation. *Howard*, 742 F.2d at 614.

Plaintiffs have presented evidence tending to show that they had no actual knowledge of the Union negotiators' demand for and receipt of pensions until Judge Bua's opinion in *Toth v. USX Corp.*, 693 F.Supp. 693 (N.D. Ill. 1988) appeared in Fairfield in November 1988. The defendants have not contested this assertion, but claim plaintiffs should have known of their cause of action long before November 1988.

Defendants point out that the claims which are the subject of this lawsuit were a matter of public record in October 1986, when union official Emmett Bruce Thrasher sued USX and the Union for Company pension benefits, alleging E.B. Rich told him that pension credits for five union officials would be a prerequisite to a successful Fairfield agreement. *Emmett Bruce Thrasher v. United Steelworkers of America, et al.*, CV 86-C1930-S. Complaint filed October 16, 1986, para. 15-17, USXE Tab 13.[63] Thrasher alleged that the settlement to the "pipe mill agreement"

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[62] The Union argues the plaintiffs knew of their injury at the time the FWA was signed. The plaintiffs could not have known they had a legal cause of action until they knew the injury was somehow connected to the defendants' actions. In *Gvozdenovic* and *Zapp*, the plaintiffs knew of the alleged misdeeds at the time the contract was signed, and the courts said the plaintiffs could show they had not discovered their injury only if they could present proof that they did not know of the existence of the contract. In this action, the plaintiffs are not claiming the Union breached its duty of fair representation by making unnecessary concessions in the FWA, but that the Union breached its duty by making concessions in exchange for pensions.

[63] The Company's submission of evidence in support of its motion for summary judgment will be referred to herein as "USXE."

included pension credited service for Rich, Phillips and others. *Id.* at para 29-30. In 1988, James Summerville and George Elliot sued the Union, USX and the Fund for pension benefits, claiming the settlement of the pipe mill agreement included pension credited service for the same union officials. *James Sommerville and George Elliot v. United Steelworkers of America, et al.*, CV 88-G-0105-S. Complaint filed January 21, 1988, para 21, USXE Tab 14. Additionally, USX and the Union were sued in the Northern District of Illinois for pension benefits under the leave of absence policy in question. *Toth, et al. v. USX, et al.*, 88 C 2135, USXE Tab 15.[64] Defendants claim the plaintiffs are charged with knowledge of these public documents.

The defendants, as the moving parties, have the burden of demonstrating that there is no genuine issues of material fact as to the due diligence question. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979); *Coats & Clark*, 929 F.2d 604. The movant may meet its burden by pointing to materials on file that demonstrate the party bearing the burden of proof at trial will not be able to meet that burden. *Coats & Clark*, 929 F.2d at 608. Therefore, though plaintiffs have the ultimate burden of proving they were diligent in pursuing their claims, on this summary judgment motion the defendants have the burden of showing the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim. *Beef Industries Litigation*, 600 F.2d at 1170. *Celotex* did not, as the Union suggests, shift the initial burden on summary judgment to the non-movant. *Coats & Clark*, 929 F.2d at 608, Union brief at 38.

Plaintiffs are chargeable with knowledge of the contents of public records notwithstanding the evidence that they had no actual knowledge of the previously filed actions. *Beef Industries*

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[64] USX claims *Toth* was commenced in March 1988; however, the filing stamp on the complaint USX submitted into evidence is illegible.

Litigation, 600 F.2d at 1170.[65] However, plaintiffs are charged with constructive knowledge of the allegations in the previously filed suits only. As the *Beef Industries* court noted, knowledge of the allegations in the suit is not the same as knowledge of evidence which would tend to support the plaintiffs' claims. *Id.* at 1171. However, knowledge of the allegations did put plaintiffs to a duty to investigate. *Id.* Nevertheless, on this summary judgment motion defendants have the burden of showing plaintiffs would have discovered adequate grounds for filing suit if they had investigated the allegations with reasonable diligence. *Id.* Only after defendants have met their burden are plaintiffs required to show that they did investigate with reasonable diligence and found nothing. *Id.*

The defendants have presented evidence which they claim shows that, had plaintiffs investigated the allegations in the lawsuits, they would have found persons who suspected Union officials were receiving pensions from the Company as a result of the FWA. At his June 1989 deposition, James Summerville testified that there were "a lot of people that knew it or thought they knew it" before July 31, 1987. USXE Tab 16. Trevor Tidwell testified in the criminal action that he learned from Ralph Gurley in 1985 that Gurley was receiving a pension from the Company. USXE Tab 18. Richard Jones testified he heard staff reps were getting Company pensions, and though Rich denied it, Jones told others he had a "gut feeling" that people had gotten pensions out of the FWA. USXE Tab 19.

[65] Contrary to plaintiffs' claim, the conclusion that they are chargeable with constructive knowledge of the contents of the public records in *Thrasher* and *Sommerville* is not inconsistent with the Union's claim that the existence of those public records is not proof that the Union knew that Rich and Phillips exchanged concessions for pensions. Knowledge that Rich and Phillips exchanged pensions for concessions cannot be imputed to anyone from the allegations in the lawsuits; the most that can be found from the allegations in the lawsuits is that Rich and Phillips were accused of taking pensions from the Company. The records, however, were sufficient to put plaintiffs on notice that they may have had a claim against the Company and the Union which should have caused them to investigate had they acted with due diligence.

The Company and the Union submitted evidence that Rich and Phillips' pensions were discussed at a local union meeting attended by several union members, in April 1986. At the meeting, Frank Williams declared that Rich and Phillips were receiving Company pensions, and a heated discussion ensued. Fred Gipson affidavit, USWE 185-87; Jackie Davis affidavit, USWE 182-84; John Wilson testimony, USXE Tab 17. Richard Jones called E.B. Rich. USXE Tab 17, Tab 19. Mr. Jones testified that Rich denied the Union officials were receiving pensions, but said they were being "worked on." USXE Tab 19.

USX also submitted a pension application it received in April 1987 from Carl P. Alessi of Indiana, wherein Mr. Alessi requested a pension under the 1984 policy and stated that he knew Union officials at Fairfield had received leaves under the policy. USXE Tab 20. The defendants also point to evidence that there was "talk" about the pensions in and about the Union hall as early as 1986, and the Union points to evidence that members of the plaintiff class were suspicious that they had been "sold out" during the FWA negotiations.[66]

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[66] Defendants also argue that plaintiffs filed suit within a month after reading Judge Bua's opinion in *Toth*, 693 F.Supp. 693 (N.D. Ill. 1988), and point out the *Toth* plaintiffs made allegations similar to those in *Thrasher* and in *Sommerville*. However, the defendants have not shown that the public records in all those cases were similar. The court has no evidence before it about the content of the public record in *Thrasher* and *Sommerville*, other than the complaints submitted in this case by the defendants. As noted above, the *Thrasher* and *Sommerville* complaints were sufficient to put the plaintiffs on inquiry notice, but did not alone constitute sufficient basis for them to file suit. Although Judge Bua rendered his opinion in *Toth* on motions to dismiss, it appears from his opinion that the record, had plaintiffs examined it, would have contained evidence of the leave of absence policy and the letter to Lynn Williams. The *Toth* record , therefore, may have provided plaintiffs with sufficient basis for filing suit. *Toth*, 693 F.Supp. at 695. Without evidence regarding the content of the *Thrasher*, *Sommerville* and *Toth* public records, the court cannot say that plaintiffs could have found a basis for filing suit from the *Thrasher* and *Sommerville* public records.

As noted above, defendants have the burden of showing plaintiffs would have discovered adequate ground for filing if they had investigated the allegations with reasonable diligence. *Beef Industry Litigation,* 600 F.2d at 1171. Defendants' evidence that plaintiffs would have discovered talk, supposition, and rumor about the pensions is not sufficient to establish that plaintiffs would have discovered adequate grounds for suit if they had investigated the allegations. Defendants have, therefore, not carried their burden of showing there are no genuine issues of fact as to the due diligence question.

Plaintiffs also claim the statue was equitably tolled from the date the FWA was signed, on December 24, 1983, to the date Judge Bua's opinion in *Toth v. USX Corp.,* 893 F.Supp. 693 (N.D. Ill. 1988) appeared in Fairfield. The Union claims the doctrine of equitable tolling does not apply to hybrid section 301 claims in view of the Eleventh Circuit's decision in *Hill v. Texaco, Inc.,* 825 F.2d 333 (11th Cir. 1987). In *Hill,* the court said that equitable tolling principles are read into federal statutes of limitations, but cannot be applied in the face of contrary congressional intent. *Id.* at 334. Therefore, the court held it would not apply the doctrine of equitable tolling where the statute provided that the action had to be commenced within one year of the violation. *Id.* The *Hill* court said equitable tolling applied where the statue [sic] explicitly spoke to starting the limitations period upon discovery of the violation or to starting the period when the cause of action accrued. *Id.* at 334-35. The Union points out that section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." 29 U.S.C. § 160(b). Despite the similarity between the section 10(b) language and the statutory language at issue in *Hill,* the Eleventh Circuit has consistently stated that the 10(b) limitations period starts upon discovery of the violation, or on the date the plaintiff should have discovered the violation. *See, e.g., Howard,* 742 F.2d at 614; *Proudfoot,* 779 F.2d at 1559; *Samples,* 755 F.2d at

887. Therefore, the court finds that the Eleventh Circuit would most likely find that equitable tolling principles apply to the section 10(b) statute of limitations. Furthermore, as the court in *Hill v. Georgia Power* noted, the *Del Costello* court expressly recognized the possibility of tolling the six-month period when it remanded one of the two cases before it for consideration of Del Costello's tolling argument. *Id,* 786 F.2d 1071, 1076 (11th Cir. 1986), *citing Del Costello,* 462 U.S. at 172. Accordingly, plaintiffs may assert a claim that the section 10(b) limitations period was equitably tolled.

To prove the statute was equitably tolled, plaintiffs must show defendants took affirmative steps to conceal the cause of action. *Hill v. Texaco,* 825 F.2d 333, 335 (11th Cir. 1987). Alternatively, plaintiffs may present proof that the defendant had a fiduciary responsibility to make disclosure or that the wrong was self-concealing. *Id.* at 335 n.2.[67]

The Union argues it did not fraudulently conceal the plaintiffs' cause of action, because it could not conceal what it did not know, and there is no evidence that Rich and Phillips traded concessions for pension benefits. It points to evidence that the FWA negotiators have consistently denied the concessions were made in exchange for the pensions. The Union cites no authority in support of its underlying premise that plaintiffs must prove the Union concealed all of the operative facts before the Union is foreclosed from relying on a statute of limitation defense. The jury might find the Union could not assert a statute of limitations defense where it fraudulently concealed information about part of plaintiffs' claim.

[67] In every case, plaintiffs must also show they exercised due diligence to discover the cause of action within the limitations period. *Hill,* 825 F.2d at 335. "Any fact that should excite [plaintiff's] suspicion is the same as actual knowledge of his entire claim." *Id.* at 335 (citations omitted). As noted above, whether plaintiffs acted with due diligence is a question of fact for the jury and defendants have not carried their burden on summary judgment of proving there is no genuine question of material fact as to that issue.

The Union also claims that it did not affirmatively conceal evidence of the pensions. Plaintiffs have come forward with evidence that Rich and Phillips denied receiving Company pensions in conversations with Bruce Thrasher and Richard Jones. PA 544-544d, 558-62.[68] A jury may determine that E.B. Rich and Thermon Phillips were acting, at least in part, on behalf of the Union when they denied receiving pensions from the Company and said that the pension matter had not been resolved.

Finally, the Union argues plaintiffs' duty of fair representation claim must fail on the merits since plaintiffs have presented no proof that the concessions in the FWA were given in exchange for pensions. In their complaint, the plaintiffs charge that the Union breached its duty of fair representation by demanding, accepting, or agreeing to accept long-term leaves of absence and pensions in consideration of concessions to the Company in the FWA. Plaintiffs' Complaint, para. 91.[69] In response to the

[68] The Union argues that Rich's alleged effort to deceive Richard Jones was unsuccessful, pointing to Jones' statement that he had a "gut feeling that the S.O.B.'s had received pensions." PA 560. However, Jones also said "[a]fter I told the Committee about the telephone conversation with E.B. Rich, Frank Williams' statements were passed off by the Committee Members as groundless and without substance." *Id.* Therefore, whether plaintiffs actually relied on Rich's statement is a question of fact for the jury. Furthermore, a jury could conclude the plaintiffs' reliance was reasonable in view of the fiduciary relationship between plaintiffs and the Union. The Union has a statutory duty to fairly represent all of the employees in collective bargaining and in enforcement of the collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Whenever a union is acting in its representative role, it must exercise its discretion with complete good faith and honesty and avoid arbitrary conduct. *Air Line Pilots v. O'Neill*, __ U.S. __, 111 S.Ct. 1127, 113 L.Ed.2d 51, 62 (1991). A jury, therefore, could find the plaintiffs' reliance on the Union's representations was reasonable in the circumstances.

[69] Plaintiffs' complaint also contains a claim that the Union breached its duty of fair representation by failing to disclose to plaintiffs that Union officials had requested Company leaves of absence during the FWA negotia-

(Footnote 69 continued on next page)

Union's summary judgment motion, plaintiffs have not asserted any other basis for their claim that the Union breached its duty of fair representation. Plaintiffs' Brief, p. 76, 77-92. As noted above, the court can find no evidence of record from which a jury could conclude that the concessions in the FWA were given in exchange for the pensions.[70] Therefore, the Union is entitled to summary judgment on plaintiffs' claim that the Union breached its duty of fair representation. Furthermore, in a hybrid section 301 claim, the plaintiff must show the employer breached its contract with the plaintiffs and that the Union breached its duty of fair representation before it may prevail against either party. *Del Costello,* 462 U.S. at 165. (citation omitted). Thus, the Company is also entitled to summary judgment on plaintiffs' hybrid section 301 claim.

VI. The Unfair Labor Practice Claim

The plaintiffs claim, in Court III of their complaint, that the Company and the Union failed to negotiate in good faith in violation of 29 U.S.C. § 158(d). Actions under sections 7 and 8 of the National Labor Relations Act, codified at 29 U.S.C. §§ 157

(Footnote 69 continued)

tions and that Union officials had received Company pensions. Plaintiffs' complaint of February 28, 1989, para. 94. That claim was not included in the November 1, 1989, pretrial order and plaintiffs have not pressed it in response to the Unions' assertion that plaintiffs' claim for breach of the duty of fair representation "rests entirely on the allegation that *concessions* were given at Fairfield in exchange for the pensions. . . ." Union brief of January 16, 1991, p. 51. The court has concluded, therefore, that plaintiffs have abandoned this aspect of their claim. Fed.R.Civ.P. 16(e).

[70] The Union presented evidence tending to show that the concessions were the result of economic necessity. The plaintiffs could not present direct evidence that the concessions were exchanged for pensions, but argued that a trade could be inferred from the circumstances. As noted above, in view of the considerable evidence providing an alternative explanation for the concessions, the plaintiffs are not entitled to such an inference.

and 158,[71] fall within the exclusive jurisdiction of the National Labor Relations Board.

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . .

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959); *Johnson v. Pullman, Inc.,* 845 F.2d 911, 914 (11th Cir. 1988). Therefore, the court lacks subject matter jurisdiction of plaintiffs' unfair labor practices claim, and it will be dismissed.

VII. ERISA.

A. USX.

The plaintiffs seek a judgment under ERISA directing defendants to reimburse the Fund for the money paid to the Union officials. Plaintiffs' Brief of May 15, 1991, p. 92.[72] Plaintiffs claim USX must refund the money because it breached its fiduciary duties owed to plaintiffs when it: (1) engaged in a self-dealing transaction with Plan assets in violation of 29 U.S.C. § 1106; (2) represented to the Fund that the six Union officials were entitled to extended leaves of absence; (3) represented to the Fund that the six Union officials were entitled to pensions;

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[71] *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241, 79 S.Ct. 773, 3 L.Ed.2d 775, 780 (1959).

[72] A cause of action for an ERISA fiduciary's breach of its duties arises under 29 U.S.C. § 1109 rather than § 1132(a)(1)(B), and § 1109 does not permit an individual beneficiary to recover damages for breach of fiduciary duty. *Simmons v. Southern Bell Tel. & Tel. Co.,* 940 F.2d 614 (11th Cir. 1991), *citing Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).

and when it (4) directed the Fund to grant pension benefits to the six Union officials.[73]

Under 29 U.S.C. § 1106, a fiduciary is prohibited from engaging in certain transactions. *Id.* Notwithstanding the provisions of section 1106, a fiduciary is not prohibited from being an officer, employee, agent, or other representative of another party in interest. 29 U.S.C. § 1108. "[T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interest as an employer when not administering the plan or investing its assets." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986). "Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits." *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989) (*citation omitted*). There is no evidence from which a factfinder could conclude that USX or its officers were acting in their fiduciary capacity when the corporate leave of absence policy was amended. The policy was amended by the Corporate Policy Committee, not by the Fund or officers of the Fund. Therefore, USX did not breach fiduciary duty when it amended its leave of absence policy.[74]

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[73] Although plaintiffs alleged USX and the Fund failed to notify the Secretary of Labor or the plaintiffs of the modification to the plan, they have denied any reliance on a theory of ERISA liability based on a "failure to notify" in violation of 29 U.S.C. § 1022. Plaintiffs' Brief of May 15 1991, p. 101.

[74] The court recognizes that, in *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), the Eleventh Circuit said "the statutorily imposed fiduciary duty to act solely in the interest of the participants and beneficiaries under ERISA required trustees who are also officers or agents of a corporation or a union to act with caution in areas of potential conflicts of interest.' *Id.* at 580, *citing Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982). The ruling seems to conflict with the holding in *Phillips*, since *Phillips* seems to indicate that no business decision by an employer can implicate

(Footnote 74 continued on next page)

However, USX may have breached fiduciary duties when it caused the Fund to pay pensions to the Union officials based upon the retroactive leaves of absence. A person is a fiduciary with respect to an ERISA plan to the extent he has any discretionary authority or discretionary responsibility in the management or administration of the plan or in the disposition of plan assets, or to the extent he renders investment advice for compensation. 29 U.S.C. § 1002(21). When USX officials acted to cause the Fund to pay pensions to Union officials out of the Plan assets, they were acting in their capacity as fiduciaries to the Plan. ERISA requires a fiduciary to discharge its duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). However, the fiduciary most do so "in accordance with the documents and instruments governing the plan...." *Id.* at § 1104(a)(1)(D). The Plan provides:

> Continuous service shall be broken by . . . absence due to leave of absence which continues beyond the period of leave granted by the Employing Company . . . provided that the continuous service of an Employee shall be broken by an occurrence prior to the effective date of his coverage under these Pension Rules which under pension practices then in effect caused a break.

The Plan, § 5.1(c). Thus, the Plan provides that an occurrence amounting to a break in continuous service "under pension practices then in effect" must remain a break in continuous service. Since the Union officials had already incurred breaks in service under former pension practices, the fiduciaries could not,

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(Footnote 74 continued)

fiduciary duties even where the plan is affected. The difference may be that, in *Deak*, the court below had made a finding that the trustees "were using their positions as fiduciaries of the Plan to further the goals of the . . . Union." *Deak*, 821 F.2d at 579. This action is more like *Phillips*, in that there is no indication that USX was using its position as fiduciary when it amended the leave of absence policy.

under § 5.1(c), pay them pensions pursuant to the "retroactive" leaves of absence granted by USX which had the effect of "mending" the break. USX claims that, despite this provision, twice in the past retroactive changes in credited service were made. The evidence USX points to, however, shows that the Plan was amended to allow for the specific payments made in those instances. PA 633-35; Plan, § 5.2. USX in its capacity as employer may amend its benefit plan and its actions will not be judged by fiduciary standards. *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988). In this case the Plan was never amended, however, and USX acting in its fiduciary capacity was obligated to pay "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). Payment of the pensions was not in accordance with the Plan provision 5.1(c).

Plaintiffs also rely on another section of the Plan, which provides:

> Continuous service shall be calculated from the Employee's last hiring date . . . to the date of retirement; provided, however, in determining the length of continuous service for pension purposes . . .
>
> (2) any period or periods not creditable as continuous service for any pension calculation purposes under an agreement with a collective bargaining representative,
>
> . . . shall not be creditable as continuous service . . .

the Plan, § 5.1(b). Section 5.1(b) refers to time which will be *credited* as continuous service, not to the events which will cause a break in continuous service. Therefore, section 5.1 and the collectively-bargained 1980 Pension Agreement do not affect the company's ability to grant a leave of absence under the Plan

provision 5.1(c) to prevent a break in service.[75] However, section 5.1(b) does provide that the 1980 Agreement affects the periods which can be credited as continuous service, and USX has not carried its burden of showing that it complied with this Plan provision in paying pensions to the Union officials. Specifically, to show it complied with this term of the Plan, USX must show the year the Union officials were working for the Unions were either: (1) not credited as continuous service with USX for the purpose of granting 70/80 pensions to the officials; or (2) credited as continuous service with USX pursuant to a provision of the 1980 Pension Agreement.[76]

Finally, as a fiduciary, USX was obligated to discharge its duties with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . ." 29

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[75] The collectively-bargained Pension Agreement between United States Steel Corporation and United Steelworkers of America effective July 31, 1980, provides in pertinent part:

> Continuous service shall be broken by:
>
> . . . absence which continues more than two years . . .

Agreement, 5.1(b)(4), PA 265-66.

[76] Plaintiffs also point to section 5.1(d) of the Plan, which provides:

> A break in continuous service shall be removed if the participant is rehired . . . provided that . . . (ii) as to any participant in a collective bargaining unit covered by a pension agreement, a break in continuous service shall be removed only if provided for in such agreement and, if so, in accordance with the provisions thereof.

The Plan, § 5.1(d). USX has pointed to no provision in the collective bargaining agreement which would allow it to remove the Union official's break in continuous service, but it does not appear that the Union officials were "participants" in that agreement, and it is certainly plain that they were never "rehired" by USX. Therefore, the applicability of section 5.1(d) to these circumstances is unclear.

U.S.C. § 1104. Plaintiffs have presented evidence showing that USX, in its capacity as employer, granted the six Union officials pensions without checking to determine that the Union officials were qualified under the new leave of absence policy. PA 74, 542. USX has not denied this charge, but argues that it was acting in its "employer" capacity when it granted the leaves of absence and that once the leaves were granted by USX "the employer," USX "the fiduciary" had no choice but to grant the pensions. However, in its fiduciary capacity, USX had an obligation to act with prudence and diligence "solely in the interests of the participants and beneficiaries." 29 U.S.C. § 1104(a). USX has not shown it acted diligently in mechanically granting pensions out of fund assets, considering USX in either its employer or fiduciary role had knowledge that USX "the employer" granted the leaves of absence under irregular circumstances and that the officials might not have been legitimately entitled to leaves of absence or pensions drawn from the Fund assets.

USX is not entitled to summary judgment as to plaintiffs' claim that it breached fiduciary duties since it has not shown that it acted with "care, skill, prudence and diligence," and that it acted "solely in the interests of the participants and beneficiaries" when it granted pensions to Union officials who had received leaves of absence under USX's revised leave policy. 29 U.S.C. § 1104(a)(1)(A), (a)(1)(B). Further, USX has not established that it acted "in accordance with the documents and instruments governing the plan: when it paid pension benefits to Union officials who received retroactive leaves of absence from USX. 29 U.S.C. § 1104(a)(1)(D). USX and the Fund's summary judgment motion as to Count IV of the complaint will be denied.

B. The Union.

Plaintiffs claim the Union violated ERISA by "failing to disclose" that USX and the Fund were paying pensions to Union officials out of the Fund, and by "failing to take appropriate action." Plaintiffs claim the Union thereby "ratified" USX and

the Fund's acts and omissions and "knowingly participated" in USX and the Fund's breach of trust. Complaint, para. 112.

The Eleventh Circuit recently concluded a non-fiduciary cannot be held liable for participating in a fiduciary's breach under ERISA. *Useden v. Acker,* 1991 WL 245243 (11th Cir. Dec. 11, 1991). Plaintiffs points out that a non-fiduciary "party in interest"[77] may be sued for appropriate equitable relief under ERISA section 502(a)(3). 29 U.S.C. § 1132(a)(3). *Neito v. Ecker,* 845 F.2d 868, 873 (9th Cir. 1988).[78] The Union is a "party in interest," but the plaintiffs have not asserted a claim for equitable relief against the Union with respect to the Fund or the Plan. Plaintiffs' Complaint, pp. 54-55. They have requested only that USX and the Fund be enjoined from further violations of 18 U.S.C. § 186 and that USX restore to the Fund the benefits

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[77] The term "party in interest" means, as to an employee benefit plan —

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodia), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

. . .

The Act prohibits certain transactions between ERISA plans and their parties in interest. 29 U.S.C. § 1106(a)(1), *cf.* 29 U.S.C. § 1108(b).

[78] That section provides, in pertinent part:

A civil action may be brought . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

29 U.S.C. § 1132(a)(3).

it paid to Union officials. *Id.* Plaintiffs are not entitled to monetary relief under § 502(a)(3). *Useden*, 1991 WL 245243). Therefore, the Union's motion for summary judgment will be granted as to plaintiffs' ERISA claims.

VIII. The Section 302 Claim

Plaintiff amended their complaint to add a claim under section 302 of the Labor Management Relations Act of 1947, 19 U.S.C. § 186, seeking a prospective injunction against future violations of that statute. The Union claims it is entitled to judgment on this claim because, *inter alia*, it is not civilly or criminally liable for Rich and Phillips' actions. As noted above, there are unresolved questions of fact underlying this issue, and the Union is not, therefore, entitled to summary judgment on that claim. Furthermore, the parties have not fully addressed the claims under section 186, since the court previously indicated it will not address non-class claims until the class claims have been resolved.[79] Memorandum Opinion and Order, December 17, 1990. The class claims against the Union have now bee fully resolved, and the Union is free to renew its motion should it conclude it continues to have a basis for the motion. However, given the cursory treatment of the section 186 claims in the present motion, the Union's motion will be denied.

IX. Conclusion.

The defendants' motion for summary judgment will be GRANTED as to plaintiffs' RICO claims, plaintiffs' hybrid section 301 claim, and plaintiffs' unfair labor practices claim. (Counts I, II, and III of the Complaint). The Unions' motion will be GRANTED as to plaintiffs' ERISA claims, and the Company and the Fund's motion will be DENIED as to plaintiffs' ERISA claims. (Count IV of the Complaint). The Union's motion is

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[79] Since the class has been certified with respect to damage claims only, it has no section 186 remedy.

DENIED as to plaintiffs' claims for prospective injunctive relief under 29 U.S.C. § 186, without prejudice to its right to renew the motion. (Count V of the Complaint).

Done, this 16th of December, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; USX CORPORATION, a/k/a U.S. STEEL CORPORATION; and THE UNITED STATES STEEL & CARNEGIE PENSION FUND,
Defendants.

ORDER

In accord with the memorandum of opinion entered contemporaneously herewith, defendants' motions for summary judgment filed July 17, 1990 are hereby GRANTED in part and DENIED in part.

The motions are GRANTED as to plaintiffs' claims under 18 U.S.C. § 1961 *et seq.*, 29 U.S.C. § 185(a), and 29 U.S.C. §158(d), set out in Counts I, II, and III of plaintiffs' amended complaint. Counts I, II, and III of plaintiffs' complaint are hereby DISMISSED.

The motion of USX Corporation and The United States Steel & Carnegie Pension Fund is DENIED as to plaintiffs' claim under 29 U.S.C. § 1132 *et seq.*, set out in Count IV of plaintiffs' complaint. The United Steelworker of America's motion is GRANTED as to plaintiffs' claim in Count IV of the complaint, and Count IV of plaintiffs' complaint is hereby DISMISSED as to the Union.

The motion are DENIED as to plaintiffs' claim under 29 U.S.C. § 186, set out in Count V of the amended complaint.

Done, this 16th of December, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, et al.,
Defendants.

MEMORANDUM OF OPINION

This cause is presently before the court on motion for reconsideration, filed by the plaintiffs' on December 31, 1991. The plaintiffs also seek to supplement the record regarding the defendant's motions for summary judgment and to amend their complaint. The plaintiffs alternatively seek an order directing entry of final judgment pursuant to Fed.R.Civ.P. 54(b) as to those claims that were dismissed on December 15, 1991.

I. Supplementation of the Record. The plaintiffs want to amend their appendix and evidence submitted in opposition to defendant's motions for summary judgment to ad: (1) James Carney's handwritten and typed notes of September 3, 1987, meeting between Andrew Toth, John Foley, John Eckman, J. Bruce Johnston, James Short, and James Carney; (2) J. Bruce Johnston's July 1989 deposition testimony about Carney's September 1987 notes; (3) James Short's July 1989 deposition testimony about the notes; (4) James T. Carney's October 1991 deposition testimony about the notes and the events of December 24, 1983; and (5) a local agreement entered into between USX and the Union at USX's National plant produced by USX in November 1990. Of this additional evidence, all but the October

1991 Carney deposition[1] was in plaintiffs' possession long before plaintiffs were required to respond to defendants' motions for summary judgment on May 15, 1991. Plaintiffs were allowed four months to organize their evidence and compose their brief in response to the defendants' briefs. In view of the significant amount of time and effort expended by the parties and the court in consideration of the motions, the court will not, at the late date, allow the plaintiffs and opportunity to supplement the record and reopen the motions.[2]

II. Amendments of the Complaint. After a responsive pleading has been filed, amendments of the complaint are permitted only with leave of court. Fed.R.Civ.P. 15(a). Leave to amend

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[1]The Carney deposition excerpts contain testimony about the circumstances of the September 1987 meeting at which Carney took notes and testimony about the events of December 24, 1983, which, according to plaintiffs, "is consistent with the testimony of William Miller." Plaintiffs' Brief of December 31, 1991, at 5.

[2]The court routinely places page limits on briefs filed in the support of and in opposition to significant motions. Recognizing the gravity of the motions, as it might affect the plaintiffs, the court acceded to their requiest that there be no limit on the length of their brief in opposition to the defendants' motions for summary judgment. It was a mistake which the court will not repeat. The plaintiffs, on May 15, 1991, filed a brief of 113 pages lengths which, to understate the case, was unhelpful. The brief demonstrated so little focus on issues and organization of thought that, rather than aiding the court in its efforts to resolve significant legal and factual issues, it actually impeded that process. Counsel had a professional obligation to present the court with clear, concise and focused analyses so that the issues might have been properly addressed. They failed in that obligation, leaving the court to founder in a sea of meaningless words and an ocean of exhibits.

Beginning in mid-September, 1991 and continuing on an almost daily basis until mid-December, 1991, the court examined thousands of pages of exhibits and considered the plaintiffs' arguments, as best they could be discerned. Now, having lost on motions for summary judgment, the plaintiffs have returned, asserting that they "inadvertently" failed to call to the court's attention evidence concerning the meeting of September 3, 1987.

shall be freely given when justice so requires. *Id.* However, denial of a plaintiff's motions to amend the complaint and supplement the record at a time when the court has already granted summary judgment but had not entered final judgment is not an abuse of discretion. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401 (11th Cir. 1989) In this case, plaintiffs argued in their brief that they had been injured by the loss of the honest and faithful services of the Union negotiators, but the court found no such claim in plaintiffs' complaint or in the pretrial order. Nevertheless, the court considered the claim and found that the claimed deprivation of the "honest and faithful services of Union officials "is not the sort of injury to business or property RICO was intended to remedy. Therefore, the court finds nothing to be gained by allowing plaintiffs to amend their complaint at this late date.

III. Reconsideration of the Issues. Plaintiffs argue they presented sufficient evidence that defendants' RICO violations caused their injuries. the court has once again examined the evidence plaintiffs presented, and finds no support therein for plaintiffs' claim that USX's granting of leaves of absence to the Union negotiators was causally connected to the concessions in the Fairfield Works Agreement which caused plaintiffs' injury. As the court noted in its original opinion, a reasonable jury could not assume there was a casual connection between the pensions and the concessions in view of the significant evidence in the record of the "economic necessity "for concessions.

Plaintiffs claim that, in reaching its decision, the court drew factual inferences from circumstantial evidence and implicitly made credibility findings because defendants' evidence of economic necessity was tainted by bias, *citing Wilmington Trust Co. v Manufacturers Life Ins. Co.*, 624 F.2d 707 (5th Cir. 1980).

The court agrees that whether USX would have re-opened the Fairfield Works absent the concessionary 1983 Agreement is a disputed issue of fact, and it has never made any contrary finding.

Nevertheless, plaintiffs never disagreed with the defendants' evidence that the Works were closed and had been closed for many months preceding the negotiations and that USX had threatened the Union and rank and file members that the plant would be permanently closed absent concessions in the agreement. The significance of defendants' evidence does not hinge on whether USX was candid with the Union about the need for concessions, but whether the Union negotiators actually had good cause, in 1983, to believe that concessions were economically necessary. Although there is a dispute about whether concessions were actually necessary to reach an agreement, there is no dispute that USX claimed concessions were necessary during the 1983 negotiations. Thus, the defendants presented evidence of one possible reason for the concession in the Fairfield Works Agreement. The plaintiffs argued there was another possible reason, the concessions were traded for Company pensions. But plaintiffs never presented any evidence of such a trade. Plaintiffs argued that a jury could infer or assume there was a causal connection between the concessions and the payment of pensions to Union officials. Such an inference would be reasonable only if there were no other explanation for the concessions. The undisputed evidence in the record is that there was one other possible reason for the concessions, USX's position during the negotiations that the concessions were economically necessary to reopen the Works. Thus, any inference that the concessions *must* have resulted from a bribe would a unreasonable. Plaintiffs are entitled only to reasonable inferences. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988); *Fidelity and Deposit Co. of Maryland v. Southern Utilities, Inc.*, 726 F.2d 692, 694 (11th Cir. 1984) (a verdict based on circumstantial evidence is not infirm simply because the evidence supports an equally probably inference to the contrary, as long as the inference on which the verdict is based is a reasonable one). On reconsideration, this court remains convinced that it correctly concluded that plaintiffs

failed to present evidence of any causal connection between the alleged RICO violation and the concessions in the Fairfield Works Agreement.

IV. Discovery

Plaintiffs claim they have been hampered in presenting their case by the court's orders limiting the scope of discovery to the Fairfield plant. The court is satisfied that it's decision to limit discovery with regard to other collective bargaining agreements is sound. Agreements at other plants present uncontrollable variables resulting from differences in size, location, equipment, productivity, and other unknowable factors, which makes the collective bargaining process unique to each plant. A comparison of the bargaining results between plants is, therefore, the proverbial comparison of apples and oranges. The innumerable possible variables between plants makes the result of collective bargaining at plants other than Fairfield irrelevant.

Plaintiffs also argue they have not yet completed discovery. In ruling on the summary judgment motions the court attempted to give full consideration to plaintiffs' inability to obtain certain discovery due to the pending appeals from this court's discovery orders, and the plaintiffs do no here claim the court failed to consider any outstanding discovery which was addressed in the Rule 56(f) motion. *See Plaintiffs' Verified Motion for Extension of the Submission Date, filed May 15, 1991.* Plaintiffs now claim they do not yet have copies of arbitration and grievance proceedings conducted by Rich and Phillips, but they do not explain why they have been unable to obtain that evidence or why they did not inform the court of their lack of discovery in that area prior to the court's ruling on the summary judgment motions. Shortly before the court entered its ruling on the summary judgment motions it extended the discover deadline to september 1, 1992, but the prior deadline of September 1, 1991 had already expired before the court extended the deadline. *See* orders of May 1, 1991, and December 11, 1991. Plaintiffs have not explained why they did

not obtain this discovery before responding to the summary judgment motions, or before the court ruled on the motions.

V. Plaintiffs' claim that the Union breached its duty of fair representation.

On reconsideration, the court has concluded it improperly shifted the burden of showing there was no dispute of material fact with regard to plaintiffs' claim that the Union breached its duty of fair representation. The Union argued only that plaintiffs' unfair representation claim was unfounded because there was no evidence that the Union negotiators exchanged concession for pensions. Union brief of January 15, 1991, at 51. For the reasons set out in the court's original opinion, the court concluded the plaintiffs did not have evidence that the concessions were exchanged for pensions and granted the Union's motion for summary judgment. However, the Union did not challenge plaintiffs' separate claim that the Union breached its duty of fair representation by failing to disclose to rank and file Union members that Union officials had requested Company leaves of absence during the Fairfield Works Agreement negotiations and that Union officials had received Company pensions. Since the Union had not met its burden of proving there was no issue of material fact, that claim was improperly dismissed and will be reinstated.

A separate order in conformity with this opinion will be entered.

Done, the 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, et al.,
Defendants.

ORDER

In accord with the memorandum of opinion entered contemporaneously herewith, plaintiffs' motion for reconsideration is hereby GRANTED and, upon reconsideration, plaintiffs' claim set out in Count II, paragraph 94 of their complaint is hereby REINSTATED. In all other respects, the court's order of December 15, 1991 shall remain unchanged.

Done this 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, et al.,
Defendants.

FINAL JUDGMENT AS TO FEW THAN ALL CLAIMS

The court finds there is no just reason for delay of entry of final judgment, and hereby DIRECTS entry of final judgment pursuant to Fed.R.Civ.P. 54(b) as to the following claims:

1. Plaintiffs' claims under 18 U.S.C. § 1961 et seq. and 29 U.S.C.§ 158(d), set out in Counts I and III of plaintiffs' amended complaint;

2. plaintiffs' claims under 29 U.S.C. § 185(a) against defendant USX Corporation, as set out in Count II of plaintiffs' amended complaint; and

3. plaintiffs' claims under 29 U.S.C. § 1132 against defendant United Steelworkers of America, as set out in Count IV of plaintiffs' amended complaint.

Done this 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a
U.S. STEEL CORPORATION,
a Delaware corporation, et al.,
Defendants .

PLAINTIFFS' MOTION TO COMPEL PRODUCTION BY THE UNION AND TO COMPEL THE UNION TO ANSWER CERTAIN INTERROGATORIES

Pursuant to rule 37 of the Federal rules of civil Procedure, plaintiffs respectfully move for an Order permitting (and compelling) the Union to produce transcripts of Grand Jury testimony and other documents in the Union's possession, custody and control (including documents in the possession of the Union's attorneys) which were requested in Requests for Production No. 1 through 15 and 32, and overruling the objections of the Union and compelling defendant Union to respond to and produce documents requested in plaintiffs' Second Request for Production of Documents, requests numbered 7, 8, 9, 11, 20, 26, 27, 28, 41, 44, 45, 56, 68, 72, 77 and 79 through 82 and to answer fully and completely, as required by Fed. R. Cia. P. rule 33, plaintiffs' interrogatories numbered 5, 21 and 24, served on the Union on or about July 10, 1990, and as grounds therefor state the following:

{ENTERED OCT. 15, 1990

Stricken
October 15, 1990
/s/ E. Nelson]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION,
a/k/a U.S. STEEL CORPORATION, et al.,
Defendants.

ORDER

This matter is before the court on motions filed by plaintiffs on September 28, 1990 to compel defendants USX Corporation and United States Steel and Carnegie Pension Fund to produce certain documents and to answer interrogatories. The motions have been fully briefed and considered by the court. Upon due consideration, the court is of the opinion that the motions, except to the extent they were withdrawn by Mr. Patrick's letter of October 5, 1990, should be and the same hereby are DENIED.

Done, this 26th of November, 1990.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION,
a/k/a U.S. STEEL CORPORATION, et al.,
Defendants.

MEMORANDUM OF OPINION

I. Statement of the Case

This is a civil action brought by a class of plaintiffs comprised of present and former employees of defendant USX Corporation ("USX" or"the Company") in Jefferson County Alabama who were represented by the United Steelworkers of America, AFL-CIO-CLC ("the Union") at any time from July 1, 1983 to the present.[1] The plaintiffs allege wrongdoing by the Company, the Union and the United States Steel & Carnegie Pension Fund ("the Fund") in connection with the negotiation and implementation of the December 1983 Fairfield Works Agreement between USX and the Union. More specifically, they claim, *inter alia*, that certain Union officials demanded and the Company agreed to amend its policy regarding leaves of absence for Union officials in such a way as to make those same officials eligible for Company pensions to be paid by the Fund and that the Fund did pay unlawful pensions to certain Union officials. The plaintiffs charge the defendants with: (1) violations of the Racketeer

[1] The class was certified with respect to damages claims only.

Influenced and Corrupt Organizations Act, 18 U.S.C.§§ 1961 *et seq.*; (2) breach of the duty of fair representation, 29 U.S.C.§ 159; (3) breach of contract; (4) unfair labor practices, 29 U.S.C.§ 158, and (5) breach of ERISA fiduciary duties, 29 U.S.C.§ 1132 *et seq.*[2]

The action is now before the court on certain discovery motions by which the plaintiffs seek discovery from the Union. They are: (1) two motions to compel the Union to produce documents, filed October 24, 1989 and July 10, 1990; (2) a motion to compel the Union to respond to interrogatories, filed October 24, 1989; and (3) a motion for an order compelling Lynn Williams, President of the Union, to answer questions propounded at depositions. The Union has responded to the discovery requests at issue by claiming attorney client and work product privileges. The motions have been fully briefed and are ripe for decision. The court has exhaustively discussed the principles of law which are generally applicable to the present questions in a memorandum of opinion entered on December 5, 1990, and therefore will not repeat that general discussion here.

I. The Motion for an Order compelling Lynn Williams to Respond to Questions Propounded at Depositions.

The Union claims an attorney client privilege in response to a question posed to Lynn Williams, President of the Union, at his deposition. The Union claims, and plaintiffs do not deny, that Mr. Williams asserted the privilege in response to one questions concerning a conversation between Bernie Kleiman and Williams about a letter J. Bruce Johnston sent to Williams in 1985. The question clearly seeks discovery of a confidential communication between attorney and client, and the privilege applies in absence of one of the exceptions.

[2] The plaintiffs also allege violations of 29 U.S.C.§ 186 as predicate acts in the RICO counts, as the acts constituting breaches of contract and breaches of the duty of fair representation, and as the basis of the unfair labor practices claim. (Plaintiffs' amended complaint, pp. 41-50)

I.A. The Crime-Fraud Exception.

Plaintiffs claim the crime-fraud exception applies to the Union attorney-client communications because they allege the Union is guilty of violations of 29 U.S.C. § 186, of conspiring to violate Section 186 and of "fraudulent concealment" of violations of Section 186.[3] The evidence before this court shows that two local Union officials have been convicted of violations of the Taft-Hartley Act, but there is nothing presently before the court to connect the Union itself with those violations. The Union was not a defendant in the criminal trial. *United States of America v. USX*, CR-89-HM-252-S.

The plaintiffs have alleged a conspiracy to violate Section 186 and fraudulent concealment of Section 186 violations, and alleged a great number of unconnected facts set out in briefs which refer the court to other briefs which, in turn, refer the court elsewhere. Nowhere have plaintiffs attempted to connect any of the alleged facts with any of the alleged crimes or frauds. The court will not speculate about what facts might support Section 186 violations by the Union, which facts might show a conspiracy, or which facts mich show the alleged fraudulent concealment. the plaintiffs have the burden of making a prima facie showing that the Union engaged in criminal or fraudulent activity. *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). The court will not speculate whether plaintiffs have met that burden. "[M]ere allegations of criminality are insufficient to warrant application of the exception." *Schroeder*, 842 F.2d at 1226. Furthermore, there is no evidence showing the communication furthered any crime or fraud, or that any communication was connected with any crime or fraud.

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[3] The plaintiffs brought these claims of the crime-fraud exception and waiver for the first time in their reply brief. The court afforded the Union an opportunity to respond.

I.B. Waiver

Plaintiffs also claim the Union waived the attorney-client privilege by: (1) claiming the leaves of absence and pensions paid to Union representatives are legal; (2) selectively disclosing communications; (3) permitting its general counsel, Bernie Kleiman to testify in the criminal trial; and (4) filing Kleiman affidavits in earlier cases.

Mr. Kleiman's testimony at the criminal proceeding concerned only the receipt of a letter from Lynn Williams, the date of the receipts, and what he did in response. He was not questioned about the conversation he had with Mr. Williams. *See* Plaintiff's Exhibits of September 20, 1990, p. 10. The affidavits concerned only the terms of the "Basic Labor Agreement", information about conversations with Toth, Thrasher and others not shown to be Kleiman's clients, and the status of various Union employees. The attorney-client privilege covers only the content of communications between attorney and client. *In re Grand Jury Proceedings (Twist)*, 689 F.2d. 1351, 1352 (11th Cir. 1982). Since Kleiman did not reveal any confidential communications in his testimony or his affidavits, there was no waiver of the privilege. Even if there were a waiver, it would not exceed the scope of the previous testimony. *United States v. Suarez*, 280 F.2d 1158 (11th Cir. 1987), *cert. denied*, 484 U.S. 987, 108 S.Ct. 505, 98 L.Ed.2d 503 (1987). Plaintiffs' questions about the content of conversation related to the letter and communications and documents concerning previous suits is beyond the scope of any of Kleiman's previous testimony.

Plaintiffs contend that the Union defense, that the pensions paid to Union representatives were legal, constitutes a waiver. Plaintiffs refer the court to the Union's answer to plaintiffs' interrogatories wherein the Union claimed that the leave of absence policy was legal still. Unlike USX's defense, which is based on a claim that the company *thought* the policy was legal,

the Union's claim that the policy was legal does not call into question the Union's knowledge of the law or intent during the time the policy was in force. Therefore a waiver is not implicated by the Union defense.

Finally, plaintiffs claim the Union has waived the privilege with respect to communications about the 1985 letter by selectively disclosing attorney communications in an April 28, 1987 letter from Lynn Williams to Bruce Johnston. In the 1987 letter, Williams informed Johnston of Union attorney's interpretation of *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the ATU*, 785 F.2d 101 (3rd Cir. 1986). The Union correctly points out that the subject matter of the 1987 letter, a 1986 court decision, is not related to the earlier 1985 communication, and it therefore does not constitute a waiver of the content of that communication.

I.C. The Garner doctrine.

Plaintiffs claim the Union cannot assert an attorney-client privilege because it owes fiduciary duties to the plaintiffs, who are Union rank and file members. *See Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

The Union claims the *Garner* doctrine should be limited to derivative suits, citing *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981). However, the *Garner* decision was not premised on the view that the corporation was to benefit from the lawsuit, but on the view that corporate management owed fiduciary duties to the stockholders of the corporation. *Garner*, 430 F.2d at 1101. The doctrine has not been so limited in the Fifth Circuit where it arose. *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988), *rehearing denied, en banc*, 863 F.2d 882, *cert. denied*, __ U.S .__, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989).

The Union also argues the relationship between union and its members is not that of owner and manager, but that of constituent

and elected representative. However similar the union official's position my be to that of an elected representative, there is one difference of importance here. That is, the relationship between union and union members has fiduciary overtones not present in the political context. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v Terry*, 494 U.S. __, 110 S.Ct. 1337, 108 L.Ed.2d 519, 529-530 (1990). It is that fiduciary aspect of the relationship that triggers the *Garner* exception to the attorney-client privilege.

The Union further argues that federal statute, particularly 29 U.S.C.§ 431 limits the information about the operation of the union that may be accessed by union members. The statue requires the Union to disclose certain types of information. *29 U.S.C.§ 431.*[4] This court finds no indication that the reporting requirements contained in Section 431 are intended to be exclusive, or that they are intended to modify the availability of discovery pursuant to the Federal Rules of Civil Procedure in a civil lawsuit. Section 434, protecting attorney-client communications, does not appear to have any effect outside of the context of the Union's statutory reporting requirements. Furthermore, Section 434 has been recognized as "roughly parallel" to the common-law attorney client privilege. *Wirtz v. Fowler*, 372 F.2d 315, 333 (5th Cir. 1966), *overruled in part on other grounds, sub nom, Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969). the traditional attorney-client privilege is not absolute, but is limited by exceptions, including the exception established in *Garner*.

Although the *Garner* doctrine is not limited to derivative actions, the court agrees that consideration of whether the plaintiffs are seeking damages for themselves or suing on behalf

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[4]The court does not find the Union's reporting requirements significantly different from the reporting requirements of an ERISA trustee, *see 29 U.S.C.§ 1021 et seq.*, or a corporation subject to the federal securities laws.

of the entity is a factor to be considered in determining if the plaintiffs have established the requisite "good cause" showing that the privilege should not be applied in the particular circumstances. *See Ward, 854 F.2d at 786 (5th Cir. 1988).* In this action, the plaintiffs are seeking damages from the Union for themselves. Such a suit does not benefit all the Union members. However, the plaintiff class here is a significant percentage of the total Union membership.[5] Furthermore, the plaintiffs' suit advances the general membership's interest in providing a check on the Union's proper discharge of its fiduciary duties to the members.

Although the court in *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 681 (D.Kan. 1986), considered only whether the plaintiffs represented a significant percentage of union members who were injured, this court is constrained by precedent to consider several factors in determining whether the attorney-client privilege should be breached. *Garner*, 430 F.2d 1093, 1097 n. 10 (5th Cir. 1970). The plaintiff class has colorable claims against the Union, and some Union officials have been convicted in this court of certain violations of the Taft-Hartly Act based upon some of the same acts which are alleged to underlie these claims. *See United States of America v. USX*, CR-89-HM-252-S. The plaintiffs have identified the specific communication they seek to discover, and there is no indication that trade secrets or other information in which the Union has an independent interest in confidentiality is involved. The court cannot conceive of another source from which plaintiffs might gain the same information. The court is satisfied the plaintiffs have made the *Garner* good faith showing, and that the doctrine applies to the Union. Therefore, the president of the Union, Lynn Williams, will be ordered to respond to the plaintiffs' questions concerning the 1985 conversation about the Bruce Johnston

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[5]The defendants have represented the class would include about 4,000 past and present Fairfield employees.

letter which took place between Bernie Kleiman and Lynn Williams.

Despite the finding that the *Garner* doctrine applies to the Union with regard to the circumstances of the 1985 conversation, the court notes the Union was not acting in its fiduciary capacity in defending this or other lawsuits. Attorney-client communications undertaken in the course of those lawsuits would not be affected by the *Garner* doctrine.

II. The Motions to Compel Production.

II.A. Request No. 5, for documents referring to the pension benefits, or to memoranda or letters related to the pension benefits, paid to Phillips, Rich, Gurley, Statum, Pierson, or Shepherd. The Union has responded that the documents were either produced in response to requests 1-4, or they were available, subject to an objection that they are irrelevant, for inspection in Pittsburgh, Pennsylvania. The Plaintiffs do not dispute this representation, but ask that the court order the Union to make the documents available for inspection when the plaintiffs return to Pittsburgh. The order is unnecessary in light of the Union's representations, and the plaintiffs' motion will be DENIED with respect to Request No. 5.

II.B. Request No. 8, for agendas of items to be negotiated or discussed, and notes of negotiations between the defendants from January 1, 1980 to present.

The Union objected that this request is too broad and unduly burdensome. Plaintiffs have offered to limit the request to documents and notes pertaining to negotiations between the Union and the Company involving USX's steelmaking facilities. Plaintiffs represent they want the information to demonstrate any disparity in compensation paid under the FWA and other agreements at similar steel-producing facilities. The agreements reached at other facilities after bargaining and nego-

tiation has little, if any, relevance to the agreement reached after bargaining and negotiations by the 1983 Fairfield negotiators. Considering the limited relevance of the information, and the extensiveness of the request, the court finds the request unduly burdensome. Plaintiffs motion to compel production of the documents requested in Request No. 8 is therefore DENIED.

II.C. Request No. 9, for notes of meetings, statements or conversations from 1983 to present between Emmett Bruce Thrasher and any person, including Bernard Kleiman, regarding the pension benefits or negotiations.

The Union claims a work product privilege with respect to the requested documents.

The work-product rule protects from discovery those documents and tangible things prepared in anticipation of litigation or for trial by a party or his representative. Rule 26(b)(3), Fed.R.Civ.P. The Union has produced for *in camera* inspection the documents it considers to be responsive to plaintiffs' interrogatories, the Union identified the documents it was withholding on the basis of the attorney-client and work product privileges. (Union response to plaintiffs' interrogatories to each defendant, dated August 1990).

The court is satisfied all of the documents produced for *in camera* review were prepared in anticipation of litigation, and they are therefore protected attorney work-product. As this court has previously noted, documents prepared prior to litigation are protected if there is a substantial probability litigation will occur and the commencement of such litigation is imminent. *Homes Ins. Co. v Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga 1977). The requested documents were closely followed by litigation between Thrasher and the Union, and the substance of the notes indicates it was likely the Union anticipated litigation. Thrasher was, in fact, threatening litigation before the interviews were completed. The remaining documents were prepared after the

Thrasher litigation had commenced, and therefore the Union reasonably anticipated future litigation regarding the same subject matter.

The *Garner* doctrine does not apply to attorney work-product. *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587-88 (N.D.Ill.1981). As explained above, plaintiffs have not met their burden of proving the crime-fraud exception is applicable to the Union, and the Union is not relying on a "good faith" defense and has therefore not impliedly waived the privilege. The plaintiffs requests for the work-product of Union attorneys will therefore be DENIED.

II.D Request No. 10, for documents related to statements made by Thrasher regarding matters in this litigation, including notes made by Bernard Kleiman or Jerome Cooper. Again, the documents are protected work product, and are NOT DISCOVERABLE.

II.E. Request No. 16, for documents showing whether any person receives any benefit under the current 1987 bargaining agreement. Plaintiffs represent in their reply memorandum of September 21, 1990, that the request deals only with Union officials who would be provided such benefits. The Union has responded that no such document exists. (Union memorandum of September 25, 1990, p.2) Therefore, the plaintiffs have their answer and the motion regarding Request No. 16 is MOOT.

II.F. Request No. 25, or documents arising from any negotiations regarding the 1983 Fairfield Works Agreement or any subsequent Fairfield Works Agreement. Again, plaintiffs limited the scope of this request in their brief, and the Union has responded to the limited request by replying there are no documents responsive to the request other than those produced by the Company to the Union and the plaintiffs at approximately the same time. Therefore, the motion regarding Request No. 25 is MOOT, since plaintiffs have their answer.

II.G. Request No. 37, for documents concerning any meeting between Phillips, Rich, Gurley, Statum, Pierson, Shepherd, or other Union official and any other person, concerning or relating to the pension benefits or monies from USX or the Fund under the leave of absence policy. The documents in question, produced for *in camera* review, are work product and are not discoverable. With the exception of some of the notes of conversations with Thrasher, discussed above, all of the documents concerning communications with Union officials are dated after the inception of the *Thrasher* litigation in October 1986 and prior to the *Toth* litigation, and concern matters directly related to those cases. (See also, August 30, 1990 affidavit of Bernie Kleiman). Plaintiffs specifically demand the Union produce notes Andrew Toth allegedly gave to Carl Frankel in a September 1987 meeting. Both parties have referred the court to pages from the criminal trial transcript, to which the court does not have ready access. Therefore, whether Toth testified that he gave Frankel the notes or that he *may* have given Frankel the notes is not decided here. Nevertheless, the Union categorically denies that it has any such document, and that must satisfy the plaintiffs unless they can submit some proof to this court that the Union's answer is wrong. Therefore, the motion with respect to Request NO. 37 is DENIED.

II.H. Request No. 38, for all documents relating to statements made by Rich, Gurley, Statum, Phillips, Pierson or Shepherd or any other Union official in regard to the matters of this litigation from the year 1983 to present. The documents in question, produced for *in camera* inspection, are work product and NOT DISCOVERABLE.

II.I Request No. 39, for documents related to agreements concerning the payment of pension benefits to Phillips, Rich, Gurley, Statum, Pierson or Shepherd by USX from 1983 to present. the Union answered it had no documents responsive to the question, other than those already produced and those pro-

tected by work product. In brief, the Union represents it believes no documents exist which fit the description of plaintiffs' request. (Union brief responding to plaintiffs' motion to compel production, submitted September 4, 1990, p.2, 5). None of the documents submitted for *in camera* inspection, previously determined to be protected work product, appear to be responsive to the request. The plaintiffs' motion to compel will therefore be DENIED with respect to Request No. 39.

II.J. Request No. 43, for agendas of items to be negotiated between the Company and the Union at negotiations for contracts or collective bargaining agreements for plants in the greater Birmingham area, including the Fairfield Works. The Union seeks to limit the request to agendas of items to be negotiated at negotiations concerning the Fairfield Works, and offered to produce those documents and the Wage Policy Statements applicable to the 1983, 1986 and 1989 rounds of bargaining in the Basic Steel Industry. Plaintiffs argue the documents they seek would reveal whether the Union officials sought extended leaves of absences from companies "other than USX." The court cannot find any connection between the request for documents of Company/Union negotiations and the desire for information regarding the Union officials' attempts at gaining benefits from other companies. Furthermore, Union negotiations with other companies are irrelevant to the issues presented in this lawsuit, and in light of the substantial burden attendant to plaintiffs' request, the motion will be DENIED with respect to Request No. 43.

II.K. Request No. 17, for all collective bargaining agreements providing for pension benefits between the company and the Union. The Union responded that USX had produced those documents, but plaintiffs insist here they are entitled to see every document in the Union's control regardless of any earlier production by the company, and regardless of whether plaintiffs already have the documents. The court could accept plaintiffs'

position if the Union were denying knowledge of the documents or their content, but it fails to appreciate the plaintiffs' insistence that the Union duplicate USX's production in this circumstance. The court will not order the Union to produce these documents, but further notes the Union has offered to provide the plaintiffs with their copies of the collective bargaining agreements, and the plaintiffs' request here is therefore MOOT.

II.L Request No. 60, for records of telephone conversations between certain Company and Union officials during the years 1983 and 1984. Plaintiffs represent the Union responded to the request by stating that it was "investigating whether records of telephone conversations between these individuals exist." In their July 10 motion, plaintiffs claimed that the Union had not yet identified any such documents. The Union has correctly pointed out the plaintiffs motion was filed immediately after the stay was lifted, and it is difficult for this court to believe plaintiffs pursued the matter any further with the Union before bringing it to the attention of the court. The court considers the Union's response in its brief of September 4, 1990 to be sufficient in the circumstances. In that brief, the Union represents that it has completed its investigation and has found it has no responsive documents in its possession other than one document produced by the Company to plaintiffs and the Union.

II.M. The remainder of plaintiffs' July 10, 1990 motion relates to Requests No. 1-4, 6, 12-16, 18-24, 26, 27, 31, 33, 34, 38, 41, 47, 48, 50, 51, 62, 64, 76-78, and 80-82. The Union response to all of these requests was:

> "The Union has no documents in its possession responsive to this request other than those which have already been produced for plaintiffs."

Plaintiffs claim the Union must respond to the requests specifically, even if the documents have already been produced by the Company or the Fund. The Union maintains it has informed

the plaintiffs its response means that the Union has produced the responsive documents other than those documents produced by the Company to both plaintiffs and the Union. The court will not order the Union to produce documents that it has possession of only because they were previously produced in this same litigation pursuant to plaintiffs' requests to another party. The Union response in brief is sufficient. The motion will be DENIED.

III. The Motion to Compel answers to Interrogatories.

Plaintiffs have moved to compel the Union to answer only one interrogatory, Interrogatory No. 28, in which the Union was asked to identify investigations, and reports, statements, and documents relating to investigations undertaken by Lynn Williams or the Union in regard to the requests by Union officials for USX pensions. The Union answered that Lynn Williams did not undertake or cause to be undertaken any investigation, and asserted a work product privilege in response to the remainder of the interrogatory. In brief, the Union further stated that the only reports of investigations were produced by Union attorneys for this case, that documents that "relate to or evidence" the Union attorney's investigation were identified in the Union's response to Plaintiff's Second Set of Interrogatories. The responsive documents were submitted for *in camera* inspection, and the court is satisfied the contents of the reports and related documents are protected by the attorney work-product privilege.

Plaintiffs have also asked the Union to identify statements made during the investigations. In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, L.Ed.2d (1947), the Supreme Court was presented with "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney ..." Hickman, 329 U.S. at 509. The court held,

> "[a]s to oral statements made by witnesses to [the attorney], whether presently in the form of his mental impres-

> sions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver that account gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding the witnesses' remarks..."

Id. at 512-13. Thus, although rule 26(b)(3) applies only to protect documents and tangible things, the *Hickman v. Taylor* rule applies when discovery of work products is sought by means of interrogatories or questions at depositions. *See 4 Moore's Federal Practice*, para. 26.64[1]. Under the *Hickman* rule, plaintiffs cannot have discovery of statements made to an attorney in the course of his investigation, whether they seek written records of the statements or the attorney's recollection. Plaintiffs' motion to compel the Union to disclose statements made to Union counsel during investigations related to this, and previous, litigation will therefore be DENIED.

IV. Conclusion.

The court will enter a separate order consistent with this opinion. the court finds that with one exception the motions to compel were not substantially justified. The Union my submit its request for costs supported by affidavit within ten (10) days. Plaintiffs may respond in an additional fifteen (15) days.

Done, this 10th of January, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION,
a\k\a U.S. STEEL CORPORATION, et al.,
Defendants.

ORDER

This cause is presently before the court on plaintiffs' motions to compel the Union to produce documents, filed October 24, 1989 and July 19, 1990, a motion to compel the Union to respond to interrogatories, filed October 24, 1989; and a motion for an order compelling Lynn Williams, President of the Union, to answer questions propounded at depositions. In accordance with the memorandum of opinion entered contemporaneously herewith,

The Motion to compel Lynn williams to answer Questions Propounded at Depositions is GRANTED.

The Motion to Compel Answers to Interrogatories is DENIED.

The motions to Compel the Production of Documents are DENIED.

Requests No. 15 and 25 are MOOT.

Done, this 10th of January, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
CV-88-N-2069-S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION,
a\k\a U.S. STEEL CORPORATION, et al.,
Defendants.

PLAINTIFFS' MOTION FOR (A) RECONSIDERATION OF SO MUCH OF THIS COURT'S JANUARY 19, 1991 OPINION AND ORDER AS ADDRESSES THE UNION'S CLAIM OF ATTORNEY WORK-PRODUCT PRIVILEGE OR (B) CERTIFICATION OF THE ORDER SO AS TO PERMIT AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C.§1292(b)

Come now plaintiffs and members of plaintiff class, by counsel, and request this court to reconsider its January 10, 1991 Opinion and Order regarding the Union attorneys' work-product, or in the alternative, respectfully move that the Order be certified so as to permit an immediate appeal pursuant to 28 U.S.C. §1292(b). As grounds therefor, plaintiffs state the following:

1. On January 10, 1991, the court entered its Order and Memorandum of Opinion, in which the court (a) denied plaintiffs' motion to compel the Union to produce certain documents withheld by the Union as attorney work-product and (b) denied plaintiffs' motion to compel the Union to answer interrogatories concerning documents created and statements taken relating to investigations by Union attorneys with

[ENTERED
FEB. 19, 1991

DENIED
/s/ Edwin L. Nelson
2-14-91]

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 91-7215, 92-6218

Leslie Ray COX; R.M. Cox; Larry Driver; Barry Nichols; John Bullard; Robert W. Kennedy, Jr.; Lorenzo G. East; Clarence M. Pope, Jr.; C.R. Altes; Jack E. Merrymon; Terry P. West; R.S. Arnold; M.W. Milstead; J.W. Wade; Manning A.C. Snider; Terry H. Melvin; Thomas E. Hill; Gary D. Swann; Ronald E. Frazier; Anthony J. Crapet; Robert M. Green; Heath L. McMeans, III; Billy Carter; Joe A. Knight; Phillip L. Drummond; Brack Wells George Boglin; Dennis E. Jones; Dennis R. Fulton; Don L. Flurry; W.T. Mayberry; Willie Young; Robert Poole; Wardell Clark; Willie J. Nation; Oscar Lee Perry; Harry S. Turner and James R. Miller, suing individually and on behalf of a class of similarly situated individuals, etc.,

Plaintiffs-Appellees, Cross-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE and United States Steel & Carnegie Pension Fund,

Defendants,

United Steelworkers of America, AFL-CIO-CLC and USX Corporation, a/k/a United States Steel Corporation,

Defendants-Appellants, Cross-Appellees.

Leslie Ray COX; R.M. Cox; Larry Driver; Barry Nichols; John Bullard; Robert W. Kennedy, Jr.; Lorenzo G. East; Clarence M. Pope, Jr.; C.R. Altes; Jack E. Merrymon; Terry P. West; R.S. Arnold; M.W. Milstead; J.W. Wade; Manning A.C. Snider; Terry H. Melvin; Thomas E. Hill;

Gary D. Swann; Ronald E. Frazier; Anthony J. Crapet;
Robert M. Green; Health L. McMeans, III; Billy Carter;
Joe A. Knight; Phillip L. Drummond; Brack Wells
George Boglin; Dennis E. Jones; Dennis R. Fulton
Don L. Flurry; W.T. Mayberry; Willie Young; Robert Poole;
Wardell Clark; Willie J. Nation; Oscar Lee Perry;
Harry S. Turner and James R. Miller,
suing individually and on behalf of a
class of similarly situated individuals, etc.,
Plaintiffs-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL &
CARNEGIE and United States Steel & Carnegie Pension
Fund; United Steelworkers of America, AFL-CIO-CLC and
USX Corporation, a/k/a United States Steel Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama.

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

Aug. 19, 1994.

Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

PER CURIAM:

Upon consideration of the petitions for rehearing, the opinion issued on April 5, 1994, and published at 17 F.3d 1386, is modified as follows:

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* Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

(1) The second paragraph of section II.B.1.b, which is found at 17 F.3d at 1398, and begins "Under § 1962(c) is it unlawful . . . .", is deleted. In its place is substituted the following paragraph:

> Under § 1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by § 1962(c). However, the plaintiffs have alleged only that USX conducted the affairs of the Fairfield Works, the Union, District 36 of the Union, and the Fund through a pattern of racketeering activity — not that USX conducted its own affairs through a pattern of such activity. We conclude that the pension fund is an enterprise separate from USX. The Supreme Court recently reemphasized that "'[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.'" *National Org. for Women, Inc. v. Scheidler* [__ U.S. __, __], 114 S.Ct. 798, 805 [127 L.Ed.2d 99] (1994) (quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527 [69 L.Ed.2d 246] (1981)). In *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir. 1993), an insurance company was held liable under this section of the statute for participating in the affairs of an independent insurance agency composed of agents of the insurance company engaged in the business of selling policies issued by the insurance company. The Sixth Circuit held that the agency was a separate enterprise from the insurance company. The agency had a separate existence, its own board of directors, and conducted its own business. We conclude that the pension fund in the instant

case is even more separate and distinct from USX than were the two entities in *Davis*. The pension fund has a separate corporate existence; it is a nonprofit membership corporation. Its existence is not dependent upon USX, and could, for example, continue long after USX went out of business. The pension fund has its own governance, which is controlled and regulated by comprehensive statutory and regulatory provisions. Thus, the governance of the pension fund is separate and distinct from that of the corporation itself. Persons are involved in a pension fund who would have no involvement in the corporation with which it is associated at all; for example, a pension fund has investment advisors and actuaries as fiduciaries. Although both USX and its employees have a role in the pension fund, the role of each in the pension fund is distinct and different from the respective role each has in the corporation itself. For example, the corporation is administrator of the pension fund, but of course its role as administrator is very different from its role in its corporate existence; its role as administrator is constrained by all of the numerous ERISA statutes and regulations. Similarly, the employees of the corporation have a different role with respect to the pension fund; there, they are participants with rights regulated by the comprehensive statutory and regulatory scheme.

(2) The final sentence in the third paragraph of section II.B.3.a., which is found at 17 F.3d at 1404, and begins "As discussed in subpart B.1.b., above, ...", is deleted.

The petitions for rehearing are otherwise denied, and no member of the panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestions for rehearing en banc are denied.

APPENDIX H

29 U.S.C. § 186

Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a

period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing

pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceedings directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended [29 USCS §§ 151-158, 159-168], or this Act [29 USCS §§ 141-144, 151-158, 159-167, 171-183, 185-187, 557]; and (B) in any proceeding where a labor organization would be

prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 USCS §§ 153, 158, 159, 160, 164, 186, 187, 401-402, 411-415, 431-441, 461-466, 481-483, 501-504, 521-531].

(d) Any person who willfully violates any of the provisions of this section shall upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381 [28 USCS § 381]), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52) [15 USCS § 17; 29 USCS § 52], and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115) [29 USCS §§ 101-110, 113-115].

(f) This section shall not apply to any contract in force on the date of enactment of this Act [June 23, 1947], until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

(June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, P. L. 86-257, Title V, § 505, 73 Stat. 537; Oct. 14, 1969, P. L. 91-86, 83 Stat. 133; Aug. 15, 1973, P. L. 93-95, § 1, 87 Stat. 314.)

18 U.S.C. §1961

Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

> (1) "racketeering activity" means . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), . . .

29 U.S.C. § 185

Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

18 U.S.C. § 1964

Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1963

Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States irrespective of any provision of State law —

. . .

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

APPENDIX I

PLAINTIFF'S EXHIBIT #85

United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 16230

J. Bruce Johnston
Executive Vice President
Employee Relations

March 5, 1985

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

Dear Lynn:

From time to time we receive and update our records concerning pension administration matters including those relating to Company recognition of bargaining unit employees who accept positions with the International Union. Accordingly, it is timely to restate U.S. Steel's policy for granting Leaves of Absences for such purposes.

As in the past, we will comply fully with the language of Section 13 of the Basic Labor Agreement which defines the availability of Leaves of Absence. In addition to the provisions set forth in Section 13, please be advised that, effective February 29, 1984, United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis. Pursuant to the above policy, we have approved requests for Leaves for six

(6) International Union Representatives, qualifying those individuals for early retirements under the United States Steel Pension Plan.

We continue to recognize the value to both parties in granting requests for Leaves of Absence, on an even-handed basis, to a reasonable number of employees who accept or hold positions with the International Union for responsibilities which directly serve U.S. Steel facilities.

Yours very truly

/s/ J. Bruce Johnston